Supreme Court, U.S.
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No. 03-

IN THE
Supreme Court of the United States

KODAK RETIREMENT INCOME PLAN AND
KODAK RETIREMENT INCOME PLAN COMMITTEE,

Petitioners,

v.

SALLY J. BURKE,

Respondent.

**ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

PETITION FOR A WRIT OF CERTIORARI

Eric J. Ward
WARD, NORRIS, HELLER
& REIDY LLP
300 State Street
Rochester, NY 14614
(585) 454-0700

Robert A. Long
Counsel of Record
John M. Vine
Kevin C. Newsom
COVINGTON & BURLING
1201 Pennsylvania Avenue, NW
Washington, DC 20004-2401
(202) 662-6000

Counsel for Petitioners

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QUESTION PRESENTED

Whether a participant in or a beneficiary of a pension plan covered by the Employee Retirement Income Security Act ("ERISA") who seeks benefits not otherwise provided under the plan based on an error or omission in the Summary Plan Description ("SPD") is entitled to recover such benefits: (1) only upon showing, at a minimum, that the plan participant or beneficiary relied to her detriment on the SPD (as the Seventh and Eleventh Circuits have held); (2) upon a less demanding showing of some form of possible or likely "prejudice" (as the First, Second, Fourth, Eighth, and Tenth Circuits have held); or (3) without any showing of detrimental reliance or prejudice (as the Third Circuit has held and the Sixth Circuit has stated).

PARTIES TO THE PROCEEDING AND RULE 29.6 LISTING

The Petitioners in this case are the Kodak Retirement Income Plan and the Kodak Retirement Income Plan Committee. The Respondent is Sally J. Burke. Neither of the Petitioners is a corporation, and, therefore, neither Petitioner has issued any stock that is owned by any publicly-traded company. Eastman Kodak Company, which is not a party to this case, is a publicly-held company.

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the court of appeals, App., *infra*, 1a-18a, is reported at 336 F.3d 103. The opinion of the district court, App., *infra*, 19a-30a, is reported at 217 F. Supp.2d 384.

JURISDICTION

The judgment of the court of appeals was entered on July 17, 2003. App., *infra*, 1a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of Sections 3, 102, 402, and 502 of the Employee Retirement Income Security Act, 29 U.S.C. §§ 1002, 1022, 1102, and 1132, are reprinted in the Appendix. *See* App., *infra*, 31a-39a.

STATEMENT OF THE CASE

This case presents an important and recurring question arising under the Employee Retirement Income Security Act ("ERISA") on which the federal courts of appeals have split three ways: In what circumstances may a plan participant or beneficiary recover benefits based on language in a summary plan description ("SPD") that differs from the actual terms of an ERISA plan? In particular, is a plan participant or beneficiary entitled to recover plan benefits based on the language of an SPD without showing that she relied, to her detriment, on the SPD?

The claim underlying this litigation is simply stated. It is undisputed that Kodak's pension plan, by its plain terms, requires "domestic partners" to file a joint affidavit attesting to their domestic partnership in order to qualify for certain benefits, including pre-retirement survivor income benefits ("SIB"). It is also undisputed that the section of the plan's

SPD summarizing SIB does not expressly refer to the affidavit requirement. Finally, it is undisputed that Respondent (1) did not file the joint affidavit required by the plan's terms and (2) did not rely on (or even read) the SPD prior to the commencement of this litigation. Respondent nonetheless seeks to recover SIB based on the terms of the SPD.

1. ERISA's Civil Enforcement Provisions. ERISA is a "comprehensive and reticulated statute." *Nachman Corp. v. Pension Benefit Guaranty Corp.*, 446 U.S. 359, 361 (1980). Section 502(a) of ERISA, 29 U.S.C. 1132(a), includes a set of "carefully integrated civil enforcement provisions." *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 146 (1985). The Court has declined to infer causes of action in the ERISA context, since the statute's carefully crafted and detailed enforcement scheme provides "strong evidence that Congress did *not* intend to authorize other remedies that it simply forgot to incorporate expressly." *Id.* at 146-47 (emphasis in original).

Section 502(a) of ERISA provides two specific remedies for reporting and disclosure violations:

- Section 502(a)(4), 29 U.S.C. § 1132(a)(4), authorizes plan participants and beneficiaries to sue "for appropriate relief" in the case of violations of ERISA Section 105(c), 29 U.S.C. §1025(c), which in turn requires disclosure of certain benefit information not at issue in this case.

- For all other reporting and disclosure violations, participants and beneficiaries are authorized to sue under Section 502(a)(1)(A) to obtain "the relief provided for in" Section 502(c), 29 U.S.C. § 1132(c). Section 502(c), in turn, provides that a plan administrator who fails or refuses to disclose certain required information may be held personally liable to a plan participant for up to $100 per day and for

"such other relief as [the court] deems proper." Subject to certain exceptions, liability under Section 502(c) arises only if a participant or beneficiary requests from the plan administrator the information to which she claims entitlement, and the administrator fails to comply with the request for at least 30 days. *Id.* § 1132(c)(1)(B).

Respondent did not invoke either of these specific reporting-and-disclosure remedies in this case. Instead, Respondent sued under ERISA Section 502(a)(1)(B), which authorizes a plan participant or beneficiary to recover benefits due "under the terms of his plan." 29 U.S.C. § 1132(a)(1)(B). The question presented here is whether a plan participant or beneficiary may base a claim for "plan" benefits on language in (or omitted from) an SPD without showing, at a minimum, that she relied to her detriment on the error or omission.[1]

2. Summary Plan Descriptions. ERISA requires employers to distribute to plan participants SPDs summarizing plan benefits. *See* ERISA §§ 102(a), 104(b), 29 U.S.C. §§ 1022(a), 1024(b). The SPD must be written in a manner calculated to be understood by the average plan participant, must be sufficiently accurate and comprehensive to apprise participants and beneficiaries of their rights under the plan, and must include the plan's eligibility requirements, as well as the "circumstances which may result in disqualification, ineligibility, or denial or loss of benefits." *Id.* § 1022(a), (b); *see also* 29 C.F.R. § 2520.102-3(l).

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[1] Respondent brought no claim under ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3). *See* App., *infra*, 22a ("Plaintiff's suit for benefits was commenced pursuant to § 502(a)(1)(B) of [ERISA]."). This may have been because under *Mertens v. Hewitt Associates*, 508 U.S. 248 (1993), the relief Respondent seeks – in effect, money damages – is not "appropriate equitable relief" within the meaning of Section 502(a)(3).

3. The Facts of This Case. In 1991, Respondent began living with Kenneth Burke, a Kodak employee. Mr. Burke was diagnosed with lung cancer in March 1999. Respondent and Mr. Burke were married in May 1999, and Mr. Burke died approximately six months later. *See* App., *infra*, 2a, 20a.

Shortly after Mr. Burke's death, Kodak's Benefits Administrator sent Respondent a letter describing the various benefits she might be eligible to receive, including SIB. SIB provides a percentage of an employee's retirement income benefit to an eligible spouse, domestic partner, dependent child, or dependent parent at the time of the employee's death. *See* App., *infra*, 3a, 20a.

In November of 1999, after learning that Respondent and Mr. Burke had been married for less than one year, the Benefits Administrator sent a second letter indicating that Respondent was not eligible for SIB but that SIB would be paid to Mr. Burke's dependent children. Included with this letter was a copy of the SPD. *See* App., *infra*, 3a, 20a-21a.

In July 2000, Respondent's lawyer wrote to the Plan Administrator appealing the denial of SIB. The letter asserted, for the first time, that Respondent qualified for SIB as a "domestic partner" rather than as a spouse. The Plan Administrator denied the appeal on the ground that it was filed outside the 90-day period allowed for an appeal from a denial of benefits, and further determined that Respondent did not qualify for SIB either as a spouse or as a domestic partner. Specifically, the Plan Administrator found that Respondent (1) was not eligible for SIB as a spouse because she had been married to Mr. Burke for less than a year at the time of his death, and (2) was not eligible for SIB as a domestic partner because she and Mr. Burke never submitted an affidavit of domestic partnership, as required by the terms of the plan. *See* App., *infra*, 3a, 21a.

4. **The District Court's Opinion.** Respondent filed an action in the United States District Court for the Western District of New York challenging the Plan Administrator's decision and seeking to recover benefits allegedly due under the terms of the Kodak plan. Both sides filed motions for summary judgment, and the court entered summary judgment for Kodak.

The district court (Larimer, C.J.) denied Respondent's claim to SIB as Mr. Burke's spouse, because the two had been married less than a year when Mr. Burke died. *See* App., *infra*, 25a. The court likewise rejected Respondent's claim as Mr. Burke's domestic partner, because the two had not filed a joint affidavit of domestic partnership as required by the plain terms of Kodak's retirement plan. *See* App., *infra*, 26a. The court found that the affidavit requirement is set forth not only in the plan itself but also in the SPD, where it is "referenced in at least sixteen different places." *Id.* Although the specific section of the SPD summarizing SIB does not reference the affidavit requirement, the district court observed that an SPD must be read "as a whole," and that "[u]nder this standard, the affidavit requirement could not have been set forth more clearly." *Id.* In addition, the court emphasized, the affidavit requirement was clearly set forth in two other publications provided to Kodak employees during the relevant time period, *You & Kodak News* and *You & Kodak Benefits Update*. *See id.* at 25a.

The district court found that it was "evident" from the record that the Burkes "were aware that Kodak had adopted a plan to provide benefits for domestic partners" but that they had "affirmatively made the decision not to take steps to establish their domestic partnership" by filing the affidavit. *Id.* at 26a. Specifically, the district court found that during the relevant time period Respondent was employed by the University of Rochester and was concerned that by applying for domestic-partner status she might jeopardize insurance

coverage of pre-existing medical conditions that had been provided by the University. *See id.* at 26a-27a.

The district court further concluded that even if the SPD was deficient in failing to reference the affidavit requirement in connection with SIB, Respondent had "failed to demonstrate that she relied to her detriment on the [SPD] and the parts now claimed to be deficient." *Id.* at 27a. Respondent testified that she never reviewed the SPD and that "her husband's decision not to list her as a domestic partner was an affirmative decision so as not to jeopardize health insurance coverage." *Id.* In short, the court found: "There is simply no evidence to support [Respondent's] assertion that she detrimentally relied on the SPD at any point." *Id.* at 28a. Accordingly, the district court entered summary judgment for Kodak.[2]

5. The Court of Appeals' Opinion. The Second Circuit reversed.[3] The court acknowledged the multiple references to the domestic-partner affidavit requirement in the SPD, but noted the absence of any reference or cross-reference to the affidavit requirement in the specific section of the SPD summarizing SIB. Because, the Second Circuit said, "the relevant section of the SPD omits the affidavit requirement, it conflicts with the Plan," which indisputably does require a domestic-partnership affidavit. App., *infra*, 11a. The court further concluded that,

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[2] Although it found the issue "unnecessary for resolution of this case," the district court rejected Kodak's argument that Respondent's claim was barred by her failure to appeal the denial of SIB within 90 days. *See* App., *infra*, 28a-29a.

[3] The court of appeals agreed with the district court that Respondent's failure to appeal within 90 days did not bar judicial review, and also rejected Kodak's argument that Respondent's marriage to Mr. Burke precluded her claim for benefits as a domestic partner. *See* App., *infra*, 4a-9a.

although Kodak's newsletter and benefits update both clearly spelled out the affidavit requirement, these publications could not cure a deficient SPD. *Id.* at 12a.

The court of appeals then addressed the question whether Respondent could seek benefits from the plan based on the language of the SPD absent any showing that she had relied on the SPD to her detriment. The court candidly acknowledged that "[t]he circuits are divided over whether detrimental reliance or prejudice is required to recover in deficient SPD cases." *Id.* at 13a. The court explained that three circuits (the Third, Seventh, and Eleventh) require detrimental reliance, *i.e.*, "an affirmative showing by the plaintiff that he read the SPD and that but for the inaccurate description he would have acted differently." *Id.* By contrast, the Second Circuit observed, four circuits (the First, Fourth, Eighth, and Tenth) allow recovery based on a "showing of *either* reliance *or* prejudice." *Id.* (emphasis in original). Finally, the court noted that two additional circuits (the Fifth and the Sixth) have stated in *dicta* that they would require *neither* reliance *nor* prejudice. *See id.*

The Second Circuit "adopt[ed] a prejudice standard." *Id.* The court concluded that a prejudice standard is most consistent with ERISA's objective of protecting plan participants against deficient SPDs. *See id.* at 14a. The Second Circuit acknowledged that the prejudice standard is "amorphous" and is applied "with varying degrees of stringency." *Id.* at 15a. For its part, the Second Circuit required, "for a showing of prejudice, that a plan participant or beneficiary was *likely* to have been harmed as a result of a deficient SPD. Where a participant makes this initial showing, . . . the employer may rebut it through evidence that the deficient SPD was in effect a harmless error." *Id.* at 16a. The court further noted that this "likely prejudice" standard would avoid the use of what it called "harsh common law principles" (including, presumably, a detrimental reliance requirement) to defeat employees' claims. *Id.*

Applying its "likely prejudice" standard, the court of appeals held that "[t]he conspicuous absence of the domestic partnership affidavit requirement in the self-contained SIB section likely led the Burkes to believe that an affidavit was unnecessary for SIB benefits." *Id.* at 17a. In addition, the court held, the Burkes' desire to preserve Respondent's University-provided health care benefits would not have prevented them from applying for SIB under Kodak's plan. *See id.* Finally, the court observed that there was no proof that the Burkes actually read Kodak's newsletter or benefits update. And even if they did, the court said, the Burkes were "entitled to rely" on a subsequently-issued SPD that did not refer to the affidavit requirement in its SIB section. *Id.* at 17a-18a. Accordingly, the court of appeals reversed the decision of the district court and remanded with instructions to enter judgment for Respondent.

REASONS WHY THE PETITION SHOULD BE GRANTED

I. There Is An Acknowledged Circuit Split Concerning Whether An ERISA Plan Participant Or Beneficiary Seeking To Recover Benefits On The Basis Of An SPD Must Show That She Relied To Her Detriment On The SPD.

The Second Circuit's opinion expressly (and correctly) recognizes that "[t]he circuits are divided over whether detrimental reliance or prejudice is required to recover in deficient SPD cases." App., *infra*, 13a. Others have also noted the split, which is both wide and deep. *See, e.g., Burstein v. Retirement Account Plan for Employees of Allegheny Health Educ. & Research Found.*, 334 F.3d 365, 379 (3d Cir. 2003) ("[O]ther Courts of Appeals that have spoken to this issue have taken differing positions."); ABA Section of Labor and Employment Law, *Employee Benefits Law* 1000 (2d ed. 2000) ("The courts have split on the extent to which reliance and/or prejudice must be proven where

there is a discrepancy between the SPD and the plan document.").

The circuit split described in the Second Circuit's opinion warrants review by this Court. Indeed, as explained below, the disagreement among the circuits is even more pronounced than would appear from the Second Circuit's opinion, for two reasons. *First*, a decision of the Third Circuit, issued within days of the Second Circuit's decision in this case, has deepened the split in the circuits. *Second*, the Second Circuit's opinion fails to recognize that a number of courts – including courts that the Second Circuit viewed as aligned with it in applying a "prejudice" standard – distinguish between omissions from SPDs and affirmative misstatements in SPDs, and allow claims for plan benefits only on the basis of affirmative misstatements. In short, the courts of appeals are in complete disarray concerning an important and recurring issue arising under ERISA.[4]

A. The Seventh and Eleventh Circuits Require A Showing Of Detrimental Reliance.

As the Second Circuit acknowledged, the Seventh and Eleventh Circuits hold that a plan participant or beneficiary seeking to recover benefits on the basis of a deficient SPD must show, at a minimum, that she relied to her detriment on the deficient SPD. In the Seventh Circuit's words: "When . . . the plan and the summary plan description conflict, the former governs . . . unless the plan participant or beneficiary has reasonably relied on the

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[4] This Court regularly grants review in ERISA cases to resolve issues on which the courts of appeals are divided. *See, e.g.*, *Black & Decker Disability Plan v. Nord*, 123 S. Ct. 1965 (2003); *Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355 (2002); *Egelhoff v. Egelhoff*, 532 U.S. 141 (2001); *Harris Trust and Sav. Bank v. Salomon Smith Barney Inc.*, 530 U.S. 238 (2000); *Varity Corp. v. Howe*, 516 U.S. 489 (1996).

summary plan description to his detriment." *Health Cost Controls of Ill., Inc. v. Washington*, 187 F.3d 703, 711 (7th Cir. 1999) (Posner, J.); *see also Helfrich v. Carle Clinic Ass'n, P.C.*, 328 F.3d 915, 918 (7th Cir. 2003) (noting "the rule" that "summary plan descriptions, if relied on, trump the plan"); *Andersen v. Chrysler Corp.*, 99 F.3d 846, 859 (7th Cir. 1996) ("erroneous information in a summary plan description" does not give rise to a valid claim "without a showing of bad faith, active concealment or detrimental reliance").[5] The Eleventh Circuit has likewise held that "'to prevent an employer from enforcing the terms of a plan that are inconsistent with those of the plan summary, a beneficiary must prove reliance on the summary.'" *Collins v. American Cast Iron Pipe Co.*, 105 F.3d 1368, 1371 (11th Cir. 1997) (quoting *Branch v. G. Bernd Co.*, 955 F.2d 1574, 1579 (11th Cir. 1992)).

The Third Circuit – which until recently lined up with the Seventh and Eleventh Circuits, *see* pages 13-14 below) – has identified several of the reasons for requiring a plan participant or beneficiary seeking to recover plan benefits based on a deficient SPD to show, at a minimum, detrimental reliance on the SPD. In *Gridley v. Cleveland Pneumatic Co.*, 924 F.2d 1310 (3d Cir. 1991), the court held that the spouse of a deceased employee was not entitled to recover additional benefits based on a deficient SPD. The court emphasized

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[5] If an employer deliberately misleads plan participants or beneficiaries, it violates the fiduciary obligations that ERISA Section 404 imposes on plan administrators, and participants and beneficiaries may sue for appropriate equitable relief under Section 502(a)(3). *See Varity Corp. v. Howe*, 516 U.S. 489 (1996). This case does not involve a claim for breach of fiduciary duty or an allegation that Petitioners deliberately sought to mislead plan participants or beneficiaries. Moreover, Section 502(a)(3) breach-of-fiduciary-duty claims require a showing of detrimental reliance. *See Daniels v. Thomas & Bells Corp.*, 263 F.3d 66, 73 (3d Cir. 2001).

that "Section 502(a) of ERISA, 29 U.S.C. § 1132(a), contains a comprehensive civil enforcement scheme that was 'intended to be exclusive.'" *Gridley*, 924 F.2d at 1315 (quoting *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 54 (1987)). The Third Circuit then considered – and refused to permit recovery under – two specific provisions of ERISA's civil enforcement scheme, Section 502(a)(1)(B) and Section 502(a)(3), 29 U.S.C. § 1132(a)(1)(B) & (a)(3).

Section 502(a)(1)(B) authorizes a beneficiary to recover benefits due "under the terms of his plan." 29 U.S.C. § 1132(a)(1)(B). The Third Circuit rejected the spouse's argument that Section 502(a)(1)(B) authorizes beneficiaries to recover benefits under the terms of an SPD, for the simple reason that "a summary plan description is not a 'plan' within the meaning of Section 502(a)(1)(B)." 924 F.2d at 1316. As the court explained, ERISA defines the term "plan," *see* ERISA § 3(3), 29 U.S.C. § 1002(3), and the statutory definition "clearly does not encompass a summary plan description." 924 F.2d at 1318. Accordingly, the court held, a plan participant or beneficiary "cannot recover under 29 U.S.C. § 1132(a)(1)(B) for benefits allegedly due under a summary plan description." *Id.* *See also* ERISA §§ 102(a), 502(d)(1), 29 U.S.C. §§ 1022(a), 1132(d)(1) (distinguishing between the SPD and the plan itself by referring to the "summary plan description of the plan" and to a "summary plan description of any employee benefit plan").

The Third Circuit also rejected the spouse's argument that a deficient SPD could give rise to a valid claim under ERISA Section 502(a)(3), which authorizes a plan beneficiary "to obtain . . . appropriate equitable relief . . . to redress [violations of ERISA] or . . . to enforce any provisions of [ERISA] or the terms of the plan." 29 U.S.C. § 1132(a)(3). The court concluded that "an ERISA reporting or disclosure violation, such as the distribution of an inaccurate summary plan description," cannot provide a basis for equitable relief, "at least in the absence of 'extraordinary

circumstances.'" 924 F.2d at 1319 (citing *Hozier v. Midwest Fasteners*, 908 F.2d 1155, 1166-71 (3d Cir. 1990)). In support of this conclusion, the Third Circuit noted that "'ERISA contains two express causes of action to remedy reporting and disclosure violations as such,' Sections 502(a)(4) and (c)." *Id.* Declining to "tamper with ERISA's comprehensive civil enforcement scheme," the Third Circuit "held that the reporting and disclosure violations at issue were irrelevant in determining entitlement to benefits." 924 F.2d at 1319 (citing *Hozier* and *Berger v. Edgewater Steel Co.*, 911 F.2d 911, 921 (3d Cir. 1990)).

B. The Third and Sixth Circuits Require No Showing Of Either Detrimental Reliance Or Prejudice.

Two circuits have taken the position that a plan participant or beneficiary need not show either detrimental reliance or prejudice to recover benefits based on an SPD.[6] The Sixth Circuit has concluded that "existing precedent does not dictate that a claimant who has been misled by summary descriptions must prove detrimental reliance." *Edwards v. State Farm Mut. Auto. Ins. Co.*, 851 F.2d 134, 137 (6th Cir. 1988). In *Edwards,* the Sixth Circuit observed that "Congress has promulgated clear directives prohibiting misleading summary descriptions" and stated that it "elect[ed] not to undermine the legislative command by imposing technical requirements upon the employee." *Id.* In rejecting the Sixth Circuit's position, the Eleventh Circuit emphasized that "the *Edwards* court cited none of the

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[6] The Second Circuit's opinion identifies a third court of appeals, the Fifth Circuit, as having stated in *dicta* that it would require neither reliance nor prejudice. But the cited case, *Hansen v. Continental Ins. Co.*, 940 F.2d 971, 983 (5th Cir. 1991), expressly states that "this Court leaves for another day the question of whether a plaintiff . . . must demonstrate reliance on the summary plan description."

'existing precedent' to which it referred, and none appears to exist." *Branch v. G. Bernd Co.*, 955 F.2d 1574, 1579 (11th Cir. 1992). Furthermore, the Eleventh Circuit stated that it does "not share the Sixth Circuit's belief that we would undermine Congress's objectives by requiring beneficiaries to prove reliance on inaccurate plan summaries." *Id.* In the Eleventh Circuit's view, "[b]eneficiaries must do their part if Congress's objective is to be met," and "when a beneficiary fails to read or rely on the summary, whether it is accurate or not, the beneficiary also prevents full appraisal of the rights under the plan." *Id.*

Recently, the Third Circuit joined with the Sixth Circuit in rejecting the reasoning of the Seventh and Eleventh Circuits, as well as its own prior opinions. *See Burstein v. Retirement Account Plan for Employees of Allegheny Health Educ. and Research Found.*, 334 F.3d 365 (3d Cir. 2003). In *Burstein*, the Third Circuit dismissed its prior statements in *Gridley*, summarized above, as *dicta*, on the ground that the panel in *Gridley* had also held that the brochure on which the plaintiff in that case relied did not qualify as an SPD.[7] The Third Circuit proceeded to hold that a plan participant or beneficiary who claims plan benefits on the basis of a conflict between an SPD and plan document "does not need to plead reliance or prejudice . . . ." *Id.* at 381. As noted above, the Third Circuit "recognize[d] that other Courts of Appeals that have spoken to this issue have taken differing positions." *Id.* at 380.

The Third Circuit's new position is that an SPD-based claim amounts to a claim for "plan" benefits under

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[7] The Third Circuit reached this result without discussing the rule that "where a decision rests on two or more grounds, none can be relegated to the category of obiter dictum." *Woods v. Interstate Realty Co.*, 337 U.S. 535, 537 (1949).

ERISA Section 502(a)(1)(B). *See Burstein*, 334 F.3d at 381-82. The court based this conclusion on the substantive requirements of ERISA Section 102(a), 29 U.S.C. § 1022(a), which states that an SPD "shall be written in a manner calculated to be understood by the average plan participant, and shall be sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of their rights and obligations under the plan." From this provision, the Third Circuit concluded that where the terms of the SPD differ from those of the plan itself, the terms of the plan should be deemed to have been "superseded and modified by conflicting language in the SPD." *Burstein*, 334 F.3d at 381. The Third Circuit observed that a claim for benefits under Section 502(a)(1)(B) is essentially "contractual in nature," and that a plaintiff asserting a breach of contract claim generally is not required to show that he or she actually read and relied on the particular contract terms at issue. *Id.* Accordingly, the Third Circuit held that "an SPD furnishes the plan's terms to the extent it conflicts with (and thus supersedes) the language of a formal plan document" and that an error or ambiguity in an SPD gives rise to a claim for plan benefits, even in the absence of detrimental reliance or prejudice. *Id.*

C. Five Circuits Apply Some Form Of Amorphous Reliance-Or-Prejudice Standard.

The Second Circuit's opinion identified four other circuits – the First, Fourth, Eighth, and Tenth – that do not require plan participants to prove detrimental reliance, but instead require some lesser showing of reliance or "possible prejudice." As the Second Circuit recognized, this intermediate standard is "amorphous" and is applied by different courts "with varying degrees of stringency." App., *infra*, 15a. For example, as the Second Circuit noted, some courts view "reliance" and "prejudice" as distinct standards, while others view them as one and the same. *See id.*

In *Govoni v. Bricklayers, Masons and Plasterers International Union of America, Local No. 5 Pension Fund*, 732 F.2d 250, 252 (1st Cir. 1984), the First Circuit denied a plaintiff's claim after noting that "[c]ase law suggests" that a plan participant or beneficiary "must show some significant reliance upon, or possible prejudice flowing from, the faulty plan description" and concluding that no such showing had been made. Similarly, in *Bachelder v. Communications Satellite Corp.*, 837 F.2d 519, 523 (1st Cir. 1988), the First Circuit denied recovery on the ground that "there is no indication of any reasonable or significant reliance" and "no detriment" because the plaintiffs "chose the best of the only two options." Accordingly, the court found that "there was neither significant reliance nor prejudice." *Id.*

In *Aiken v. Policy Management Systems Corp.*, 13 F.3d 138, 141 (4th Cir. 1993), the Fourth Circuit quoted the First Circuit's reference in *Govoni* to "some significant reliance upon, or possible prejudice flowing from, the faulty plan description," and adopted this "disjunctive construction as our own." The Fourth Circuit remanded in *Aiken* to the district court with instructions that "[i]f the district court does not find reliance on remand, the district court must then make a separate factual finding on the prejudice issue. If the district court finds reliance, that, of course, is the end of the inquiry under the reliance or prejudice standard." *Id.* at 142. *Accord Stiltner v. Beretta USA Corp.*, 74 F.3d 1473 (4th Cir. 1996) (en banc) (reaffirming *Aiken*).

Similarly, in *Palmisano v. Allina Health Systems, Inc.*, 190 F.3d 881, 887-88 (8th Cir. 1999), the Eighth Circuit, in the course of an opinion affirming the denial of benefits, stated that "to secure relief on the basis of a faulty summary plan description, the claimant must show some significant reliance on, or possible prejudice flowing from the summary." *Accord Dodson v. Woodmen of the World Life Ins. Soc'y*, 109 F.3d 436, 439 (8th Cir. 1997) ("A showing of

reliance or prejudice must be shown to entitle a claimant to relief based on a faulty SPD.").

Finally, in *Chiles v. Ceridian Corp.*, 95 F.3d 1505, 1519 (10th Cir. 1996), the Tenth Circuit held that a reliance-or-possible-prejudice standard "makes sense because the purpose of the SPD is to give employees an understanding of the plan upon which they are entitled to rely; the master plan document, however, is also relevant to determine what the terms of the plan actually are." Thus, the court concluded, "[o]nly where employees rely on an ambiguous or faulty SPD, or otherwise show prejudice from the inconsistency between the SPD and the master plan document, is relief appropriate. Any other rule would allow a windfall for some employees and unfairly increase costs for employers and their insurers, who rely on the terms of the plan in providing benefits and coverage. This in turn could jeopardize the solvency of the plan with respect to the remaining employees." *Id. Accord Nance v. Sun Life Assur. Co. of Canada*, 294 F.3d 1263, 1272 (10th Cir. 2002) (reaffirming *Chiles*).

D. There Is A Further Circuit Conflict Concerning Whether Omissions In SPDs Are Treated The Same As Affirmative Misstatements.

In its opinion, the Second Circuit purported to align itself with four other circuits – the First, Fourth, Eighth, and Tenth – that, it said, would apply some version of the (admittedly amorphous) "prejudice" standard to this case. In fact, three of those circuits – as well as at least three others – likely would *not* apply a prejudice standard (or even a detrimental reliance standard) here because the claim in this case alleges an omission from an SPD rather than an affirmative misstatement.

There is no dispute in this case that Kodak's Retirement Income Plan requires domestic partners to file a

joint affidavit to qualify for SIB benefits. *See* App., *infra*, 17a, 25a; C.A. App. A15, A19. The Second Circuit held that because "the relevant section of the SPD *omits* the affidavit requirement, it conflicts with the Plan." App., *infra*, 11a (emphasis added); *see also id.* at 2a ("The SPD was defective for *omitting* a critical restriction on Mrs. Burke's eligibility for [SIB] as a domestic partner." (emphasis added)). On that basis, the Second Circuit applied a "likely prejudice" standard, and held that under that standard Respondent had a valid claim for plan benefits.

Contrary to the Second Circuit's view, a number of circuits – including the Fourth, Fifth, Sixth, Seventh, Eighth, and Tenth – have held that in suits for plan benefits an SPD's *silence* on a particular issue cannot trump clear plan language concerning that issue. The Sixth Circuit's en banc decision in *Sprague v. General Motors Corp.*, 133 F.3d 388 (6th Cir. 1998) (en banc), is illustrative. There, the plan under review clearly reserved the employer's right to amend or terminate benefits, but the SPD was silent with respect to amendment. The Sixth Circuit acknowledged its earlier decision in *Edwards v. State Farm*, 851 F.2d at 136, to the effect that "statements in a summary plan are binding and if such statements conflict with those in the plan itself, the summary shall govern." But the en banc court held that "the principle announced in *Edwards* does not apply to silence," and that "[a]n omission from [a] summary plan description does not, by negative implication, alter the terms of the plan itself." *Sprague*, 133 F.3d at 401.

Decisions of the Fourth, Fifth, Seventh, Eighth, and Tenth Circuits are in accord with the Sixth Circuit's *Sprague* decision, and in conflict with the Second Circuit's decision here. *See Tillery v. Hoffman Enclosures, Inc.*, 280 F.3d 1192, 1198 (8th Cir. 2002) ("Although the provisions of an SPD prevail over conflicting provisions contained in the actual plan, the rule does not apply 'when the plan document is specific and the SPD is silent on a particular matter. While

clear and unambiguous *statements* in the summary plan description are binding, the same is not true of silence.'" (internal citations omitted)); *Charter Canyon Treatment Center v. Pool Co.*, 153 F.3d 1132, 1136 (10th Cir. 1998) ("[I]t is axiomatic that if a summary's language can trump language contained in the master plan documents in the event of a conflict, the documents must actually conflict. ... [A] summary plan description which is silent on a specific term or issue cannot prevail over the master plan document."); *Martin v. Blue Cross & Blue Shield of Virginia, Inc.*, 115 F.3d 1201, 1205 (4th Cir. 1997) ("[W]e find no conflict between the absence of [language granting an insurer discretion to determine whether a medical procedure is experimental] in the SPD and its presence in the Plan. Vesting the plan administrator with discretion in making coverage decisions simply does not conflict with the SPD's silence on the matter."); *Wise v. El Paso Natural Gas Co.*, 986 F.2d 929, 938 (5th Cir. 1993) ("While clear and unambiguous *statements* in the [SPD] are binding, the same is not true of silence."); *Herrmann v. Cencom Cable Assocs.*, 978 F.2d 978, 983-84 (7th Cir. 1992) (rejecting reliance on SPD's silence because "[a]lthough a summary plan description should include matters that affect coverage and prevails over the plan itself in the event of a conflict, no document can include every detail and remain a summary") (internal citations omitted).

Notably, several of the courts with which the Second Circuit aligned itself in refusing to require proof of detrimental reliance (the Fourth, Sixth, Eighth, and Tenth Circuits) have, on the issue of SPD silence, endorsed an approach quite at odds with the Second Circuit's. Conversely, at least one of the courts with which the Second Circuit here expressly split by refusing to require proof of detrimental reliance (the Eleventh Circuit) has, on the issue of silence, indicated its agreement with the Second Circuit. In *Branch v. G. Bernd Co.*, in response to the argument that

detrimental reliance should not be required where an SPD omits, rather than affirmatively misstates, certain information, the Eleventh Circuit held that it was "irrelevant" whether the SPD "misrepresented or omitted" the eligibility requirement at issue. 955 F.2d at 1579 n.2. These shifting alliances among the circuits reveal an area of ERISA doctrine in utter disarray and in need of this Court's clarification. *See* ABA Section of Labor and Employment Law, *Employee Benefits Law* 452 (2002 Cum. Supp.) ("If the plan contains a provision adverse to the participant and the SPD is silent in that regard, some courts enforce the plan's provisions whereas others do not.").

* * * * *

In sum, the cases reveal a three-way split, acknowledged by the court of appeals in this case as well as by other courts and commentators, involving at least nine circuits. As we have explained, the split is even worse than the Second Circuit recognized, as a result of the Third Circuit's recent decision in *Burstein*[8] and the cases distinguishing between omissions and affirmative misstatements in SPDs. Even before the most recent appellate decisions, two commentators had concluded that "the cases on inconsistent and silent plan documents present a number of rules, exceptions, and interpretations that often seem to depend on what result the judge wants to reach." W. Boies & N. Ross, *Communicating With Employees About*

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[8] Even if certiorari is immediately sought in *Burstein*, that case provides a poor vehicle for resolving the question presented here. The Third Circuit's decision in *Burstein* is interlocutory in nature; the court of appeals there merely reversed a district court's dismissal of several beneficiaries' claims and remanded "for further proceedings consistent with this opinion." 334 F.3d at 382, 390. *See generally* R. Stern, E. Gressman, et al., *Supreme Court Practice* §§ 2.3, 4.18, at 74, 258 (8th ed. 2002) (Supreme Court typically declines to exercise certiorari power to review non-final federal-court decisions).

Benefits: A Central Issue In ERISA Administration and Litigation, 664 PLI/Lit 487, 498 (Oct. 2001).[9] Only this Court can resolve the disagreements among the circuits and bring uniformity to this important area of the law.

II. The Question Presented Is Important And Recurring.

SPDs play an important role in ERISA's comprehensive regulatory scheme. As noted above, Congress has expressly given plan participants and beneficiaries a remedy under ERISA to address employers' deliberate attempts to mislead, *see supra* at 10 n.5, as well as specific remedies for violations of ERISA's disclosure provisions, *see supra* at 2-3. The issue in this case is

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[9] The lower courts' divergent analyses of the facts of this case illustrate how an amorphous "prejudice" standard can be manipulated to produce different outcomes. The Second Circuit analyzed this case essentially as follows: We know that (1) the SPD mentions the affidavit requirement 16 times; (2) Respondent never read the SPD; (3) the Burkes received two communications clearly stating that the affidavit requirement applied to SIB; and (4) the Burkes made an affirmative decision not to apply for domestic partner benefits for fear of losing health benefits provided by Respondent's employer. We nevertheless find "likely prejudice" because if the Burkes had read the SPD, (1) they probably would have noticed that the affidavit requirement was omitted from the section describing SIB; (2) they probably would have inferred from the omission that there was no affidavit requirement for SIB; and (3) they probably would have concluded that the two communications that clearly required an affidavit as a prerequisite to SIB were superseded by the SPD.

The district court's approach seems at least equally plausible: The Burkes were not prejudiced because (1) the affidavit requirement was adequately disclosed in the SPD and in the two additional communications; (2) it is undisputed that Respondent herself never read the SPD; and (3) the Burkes made an affirmative decision not to apply for domestic partner benefits to avoid losing health benefits, *not* because of the absence of any express mention of the affidavit requirement in the SIB section of the SPD.

whether, and in what circumstances, participants and beneficiaries are also entitled to pursue claims for plan benefits based on omissions or mistakes in SPDs that are not intentionally misleading. The answer to this question directly affects millions of plan participants, beneficiaries, sponsors, and administrators around the country. Moreover, because many ERISA plans, like Kodak's pension plan, are national in scope, it is important that the answer to the question presented here be uniform across the circuits.

If a plan administrator omits information from an SPD (or includes inaccurate information in the SPD), it is far from clear that the interests of plan participants and beneficiaries are furthered by allowing any and all claims for additional benefits based on the defective SPD. If every error or omission in an SPD requires an ERISA plan to pay out substantial benefits not provided for under the terms of the plan itself, the plan may find itself unable to pay all the benefits that *are* provided for by the terms of the plan. Where a plan beneficiary has not relied on the defective SPD to her detriment, a rule providing her with additional benefits, above and beyond those provided for by the plan itself, amounts to a windfall that, when multiplied many times over, could threaten the fiscal integrity of the plan.

As the many cases that form the split here attest, the issue is not only important but also recurring. Given the complexity of ERISA and ERISA plans, and the fact that SPDs, by definition, are summaries of ERISA plans, it is extremely difficult, if not impossible, to produce SPDs that are entirely free of arguable error, omission, or ambiguity. Absent this Court's intervention, litigation – as well as confusion and consternation – will continue to mount.

III. A Plan Participant Or Beneficiary Seeking Benefits Based On An SPD Must Show, At A Minimum, Detrimental Reliance.

The lower court decisions adopting a relaxed "prejudice" standard – or requiring no showing whatsoever beyond an error or omission in the SPD – are unpersuasive. By and large, these decisions simply assert that Congress intended for plan participants and beneficiaries to read and rely on SPDs and, therefore, that employers should be encouraged to provide accurate SPDs and penalized for failing to do so. Most of these decisions do not even attempt to reconcile their holdings with the principle that courts should not tamper with ERISA's carefully calibrated remedial provisions, including provisions that expressly provide remedies for violations of ERISA's reporting and disclosure requirements.

The argument (typified by the Third Circuit's *Burstein* decision) that an SPD-based claim for benefits is a claim for benefits due "under the terms of [a] plan" within the meaning of ERISA Section 502(a)(1)(B) is unavailing for several reasons. Most obviously, the argument fails to account for the fact that in cases (like this one) in which a participant or beneficiary is seeking to enforce an SPD as against the contrary terms of her plan, the very basis for the suit is that the benefits at issue are *not* provided for by the terms of the plan itself.

Moreover, by equating SPDs with the "plan[s]" they summarize, the argument ignores textual and structural evidence clearly differentiating SPDs from plans. *First*, the argument ignores that ERISA expressly defines the term "plan" so as not to include SPDs. *See Gridley*, 924 F.2d at 1318 (citing ERISA § 3(3), 29 U.S.C. § 1002(3)). *Second*, the argument ignores statutory references that expressly distinguish between the SPD and the plan itself – references, for instance, to a "summary plan description of the plan" and

a "summary plan description of any employee benefit plan." *See* ERISA §§ 102(a), 502(d)(1), 29 U.S.C. §§ 1022(a), 1132(d)(1). *Third*, the argument ignores the fact that SPDs and written plan documents are established, and their precise contents regulated, by different statutory and regulatory provisions. *Compare, e.g.,* 29 U.S.C. § 1022(b) and 29 C.F.R. § 2520.102-3 (cataloguing required elements of SPDs), *with, e.g.,* 29 U.S.C. § 1102(b), 26 U.S.C. §§ 401(a)(9), 401(a)(14), 411(d)(3), and 26 C.F.R. § 1.416-1 T-36 (listing several of numerous required elements of written pension plan documents).

Finally, the argument that an SPD, in the Third Circuit's words, "modifie[s]" the plan's terms, *see Burstein*, 334 F.3d at 381, conflicts with ERISA Section 402(b)(3), 29 U.S.C. § 1102(b)(3), which requires that a "procedure" for amending a plan be established and followed – a procedure that is not satisfied by issuing an SPD that inadvertently misstates or omits terms of the plan. As this Court explained in *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 82 (1995), "[r]equiring every plan to have a coherent amendment procedure serves several laudable goals," including "increas[ing] the likelihood that proposed plan amendments, which are fairly serious events, are recognized as such and given the special consideration they deserve," and "enabl[ing] plan administrators, the people who manage the plan on a day-to-day level, to have a mechanism for sorting out, from among the occasional corporate communications that pass through their offices and that conflict with the existing plan terms, the bona fide amendments from those that are not."[10]

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[10] The Third Circuit's argument that SPD-based claims under ERISA Section 502(a)(1)(B) are "contractual in nature," *Burstein*, 334 F.3d at 381, faces yet another hurdle. The SPD in this case, like many others, contains multiple express disclaimers. On page 2, the SPD (...continued)

These considerations counsel that, at the very least, a participant or beneficiary seeking to shoehorn an SPD-based claim into Section 502(a)(1)(B) must show that she relied to her detriment on the SPD. Anything short of a detrimental reliance standard merely confers a windfall and, in the process, subverts ERISA's carefully crafted remedial scheme.

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conspicuously states, in bold type: **"Plan Documents – This book contains summaries of plan documents and does not contain the complete text of each plan document. For each plan, the plan document serves as the final authority in all matters relating to plan interpretation."** *You & Kodak*, p. 2 (1997). Page 2 goes on to list three telephone numbers participants or beneficiaries may call to obtain master plan documents. *See id.* The section of the SPD pertaining to Retirement Income, of which SIB is one aspect, likewise states: **"Plan Document Controls:** If there is a conflict between this summary and the plan document, the plan document will control. See the 'General Information' section in this handbook to find out how to get a copy of the plan document." *Id.* at 282 (boldface in original). The SPD's "General Information" section, in turn, again lists the phone numbers to call to obtain master plan documents, and goes on to reiterate that "[n]one of the summaries contain the complete text of its related plan" and that "[i]f there is a conflict between a plan document and its summary, the plan document will control." *Id.* at 335. If, as the Third Circuit has suggested, the SPD is indeed a contract then, presumably, all of its provisions, including its disclaimers, should be enforced.

Not surprisingly, given the widespread disagreement among the lower courts in this area of ERISA law (*see supra* at 8-20), courts have disagreed about the effect, if any, to be given to such disclaimers. *Compare, e.g., Pisciotta v. Teledyne Indus., Inc.*, 91 F.3d 1326, 1331 (9th Cir. 1996), and *Gillis v. Hoechst Celanese Corp.*, 4 F.3d 1137, 1142 (3d Cir. 1993) (enforcing), *with, e.g., Pierce v. Security Trust Life Ins. Co.*, 979 F.2d 23, 26-28 & n.4 (4th Cir. 1992), *Hansen v. Continental Ins. Co.*, 940 F.2d 971, 982 (5th Cir. 1991), and *Anderson v. Alpha Portland Indus., Inc.*, 752 F.2d 1293, 1299 n.13 (8th Cir. 1985) (refusing to enforce). *See generally* ABA Section of Labor and Employment Law, *Employee Benefits Law* 1001 (2d ed. 2000) ("Many courts refuse to give effect to such disclaimers when asserted against participants; however, other courts continue to give effect to such disclaimers.").

The "prejudice" standard adopted by the Second Circuit and other circuits is no more faithful to the statutory language and structure than the "plaintiffs always win" standard adopted by the Third and Sixth Circuits. Moreover, as the Second Circuit readily acknowledged, the prejudice standard is "amorphous" and is applied by different courts "with varying degrees of stringency." App., *infra*, 15a. Such freewheeling and manipulable standards will yield unpredictable results and, accordingly, should be avoided.

As noted above, requiring plans to pay out extra, SPD-based benefits in the absence of detrimental reliance merely confers a windfall on some participants and beneficiaries, leaving fewer plan assets to cover the bona fide plan-based claims of other participants and beneficiaries. As one court observed, while the limitations of ERISA's remedial provisions may "represent a modest concession to employers' interests," it is "[m]ore likely" that "they embody Congress's judgment that employees themselves are best served by an enforcement regime the minimizes employers' expected liability for reporting and disclosure violations – and with it, the disincentives against creating employee benefit plans in the first place." *Hozier*, 908 F.2d at 1170.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Eric J. Ward
WARD, NORRIS,
HELLER & REIDY LLP
300 State Street
Rochester, NY 14614
(585) 454-0700

Robert A. Long
Counsel of Record
John M. Vine
Kevin C. Newsom
COVINGTON & BURLING
1201 Pennsylvania Avenue, NW
Washington, DC 20004-2401
(202) 662-6000

Counsel for Petitioners

October 2003

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 02-9051

SALLY J. BURKE,

Plaintiff-Appellant,

v.

KODAK RETIREMENT INCOME PLAN and
KODAK RETIREMENT INCOME PLAN COMMITTEE.,

Defendants-Appellees,

Appeal from the United States District Court
for the Western District of New York

D.C. No. 00-CV-6596L

(July 17, 2003)

Before MINER, McLAUGHLIN, and POOLER, Circuit Judges.

McLAUGHLIN, Circuit Judge:

Plaintiff Sally J. Burke sued the Retirement Income Plan Administrators of her deceased husband's employer, the Eastman Kodak Company ("Kodak"), for denying her survivor income benefits. She alleged that defendants Kodak Retirement Income Plan ("KRIP") and Kodak Retirement Income Plan Committee ("KRIPCO") (collectively, the "Plan Administrators") based their denial on a deficient Summary Plan Description ("SPD") in violation of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §§ 1001 *et seq.*

The United States District Court for the Western District of New York (Larimer, J.) granted defendants summary judgment and dismissed the complaint. The court held that the SPD complied with ERISA's disclosure requirements. The court further concluded that even if the SPD were defective, Mrs. Burke could not show that she relied on the SPD to her detriment. We disagree with both conclusions.

The SPD was defective for omitting a critical restriction on Mrs. Burke's eligibility for survivor income benefits as a domestic partner. Moreover, requiring plan participants or beneficiaries to show detrimental reliance to recover for a deficient SPD contravenes ERISA's objective to promote distribution of accurate SPDs to employees. We now adopt a prejudice standard and find that Mrs. Burke was prejudiced as a matter of law.

BACKGROUND

Kenneth Burke was a Kodak employee for twenty-seven years. Before their marriage on May 17, 1999, Mr. and Mrs. Burke lived together for eight years as domestic partners. In 1994, Mrs. Burke suffered a physically and mentally debilitating stroke. In the fall of 1999, after the couple had been married for less than six months, Mr. Burke died of lung cancer.

Mr. Burke was a participant in Kodak's pre-retirement Survivor Income Benefits ("SIB") plan, which provided payments to spouses, domestic partners, dependent children or dependent parents upon the death of the employee. As required by ERISA, Kodak distributed an SPD contained in an approximately 300 page employee handbook, summarizing its employee benefits plan (the "Plan"), including SIB. The plan and sixteen sections of the SPD explicitly require "domestic partners" to file a joint affidavit on a form provided by the Plan Administrator if they wish to be eligible for various types of benefits. Significantly, the

section of the handbook that deals with SIB fails to mention the affidavit requirement.

To publicize the benefits available to domestic partners, Kodak circulated a 1996 Employee Benefits Newsletter and a 1997 Benefits Update. The Newsletter and Update explained that domestic partners had to file an affidavit of domestic partnership to qualify for certain employee benefits, including SIB. After the Newsletter and Benefits Update were circulated, Kodak issued a revised version of its SPD. The SIB section of the new SPD, however, omitted the affidavit requirement.

The week after Mr. Burke's death, Kodak sent Mrs. Burke a letter describing the benefits available to a surviving spouse of more than one year. In response, Mrs. Burke called Kodak to explain that she had been married for less than a year. By a second letter, Kodak informed Mrs. Burke that, because she was married for less than a year, she was ineligible for pre-retirement SIB. This letter referred to page ninety-eight of an enclosed handbook for spousal eligibility requirements.

The handbook also happened to contain a paragraph stating that aggrieved beneficiaries "should" file an appeal of Kodak's initial denial within ninety days. In this case, ninety days from Kodak's initial denial was February 21, 2000. Almost five months later, Mrs. Burke finally appealed to the Plan Administrators.

In her appeal, Mrs. Burke included an affidavit describing her domestic partnership status. In her appeal letter, she cited her distraught "emotional state . . . upon the death of her husband" as the reason for her failure to appeal within the ninety-day limitations period. Unmoved, the Plan Administrators denied her appeal as untimely and further stated that, even had her appeal been timely, Mrs. Burke was ineligible for SIB as a domestic partner because the Burkes never filed the joint affidavit required by the plan.

Mrs. Burke then filed this ERISA action. Her claim is that the SPD was deficient because it failed to set forth the affidavit requirement in the section dealing with SIB. After discovery, Kodak moved for summary judgment.

The district court rejected the Plan Administrators' attempt to invoke the ninety-day limitation. In the court's view, Kodak's notice to Mrs. Burke of the ninety-day period was inadequate. The court also held that Mrs. Burke could qualify for benefits both as a surviving spouse and as a domestic partner. It therefore reached the merits of her claim, but affirmed the Plan Administrators' denial of survivor income benefits because the Burkes had failed to comply with the domestic partnership affidavit requirement. It also held, in the alternative, that even if the SPD was deficient, Mrs. Burke failed to demonstrate that she relied to her detriment on the SPD. *See Burke v. Kodak Ret. Income Plan*, 217 F. Supp.2d 384, 389-91 (W.D.N.Y. 2002).

Mrs. Burke now appeals.

DISCUSSION

Preliminarily, the Plan Administrators argue that: (1) Mrs. Burke's claims were barred by her failure to exhaust her administrative remedies; and (2) her application for survivor income benefits as a domestic partner was moot. We find these arguments without merit.

I. *Exhaustion of Administrative Remedies*

The Plan Administrators claim that Mrs. Burke failed to exhaust her administrative remedies and thus the district court erred in reaching the merits of her ERISA claim. Mrs. Burke concedes, as she must, that she appealed KRIP's denial of benefits after the ninety-day limitations period. The district court, nevertheless, refused to enforce the ninety-day limitation and we agree.

Whether Mrs. Burke exhausted her administrative remedies under ERISA is a question of law we review *de novo*. *See Kinkead v, SW Bell Corp. Sickness & Accident Disability Benefit Plan*, 111 F.3d 67, 68 (8th Cir. 1997) ("Exhaustion is a threshold legal issue we review *de novo*").

We require the exhaustion of administrative remedies for the denial of ERISA benefits. *See, e.g., Chapman v, Choicecare Long Island Term Disability Plan*, 288 F.3d 506, 511 (2d Cir. 2002). The ERISA regulations adopted by the Department of Labor ("DOL") allow employers to impose a time limit on the right to appeal, so long as it is not shorter than sixty days. *See* 29 C.F.R. § 2560.503-1(h)(2)(i). Where a claimant fails to appeal a denial of benefits under an employee plan within the prescribed time limit, the court will generally not reach the merits of her claim. *See, e.g., Chapman*, 288 F.3d at 511.

Under the ERISA statute and the DOL regulations, the denial must notify the claimant of appeal procedures under the plan. *See* 29 U.S.C. § 1133 & 29 C.F.R. § 2560.503-1. A written notice of denial must be comprehensible and provide the claimant with the information necessary to perfect her claim, including the time limits applicable to administrative review. *Id.* A notice that fails to substantially comply with these requirements does not trigger a time bar contained within the plan. *See White v. Jacobs Eng'g Group Long Term Disability Benefit Plan*, 896 F.2d 344, 350 (9th Cir. 1990).

Kodak's notice was inadequate for two reasons.

First, Kodak's initial denial letter does not expressly say that Mrs. Burke had ninety days to appeal. Rather, the letter contains a cross-reference to page 98 of the handbook, which deals with spousal eligibility. That handbook also contains an appeals section – not on page 98, but on page 140 – stating that an aggrieved beneficiary "should" appeal

"within 90 days." This section, however, does not help Kodak. Based on the denial letter's exclusive reference to spousal eligibility, Mrs. Burke's focus in turning to the handbook would justifiably have been on her eligibility, not on the time limit for appeals. *See Ross v. Diversified Benefit Plans, Inc.*, 881 F. Supp. 331, 335 (N.D. Ill. 1995) (notice insufficient where denial letter "did not mention the Plan's appeal procedure or specifically refer the claimant to the Plan book for information about the appeal procedure").

The Plan Administrators argue that the denial letter need not inform an individual of her appeal rights provided that the materials accompanying the letter do so. Their position, however, is disingenuous. The cases the plan administrators cite for this proposition involved denial letters that *contained* notice of appeal rights. *See White*, 896 F.2d at 347 (denial letter "informed White that he had 60 days to appeal"); *Gruber v. Unum Life Ins. Co. of Am.*, 195 F. Supp.2d 711, 715 (D. Md. 2002) (denial letter "stated that Plaintiff could have the decision reviewed if she made a request in writing within 60 days"); *Kenvan v. Empire Blue Cross & Blue Shield*, 1996 WL 14446, at *3 (S.D.N.Y. Jan. 16, 1996) (explanation of benefits form contained the following notice: "IMPORTANT: if you do not agree with the amount approved you may ask for a review. To do this you must write to us [within six months]").

Secondly, even if Kodak's denial letter had cross-referenced the time limitation's provision in the handbook, the language requiring appeal within ninety days is opaque:

> ***If you remain dissatisfied and wish to appeal, you should, within 90 days of the date the claim was denied (or within 90 days of the date the claim is assumed to be denied), write a letter to the plan administrator asking for a review.***

(bold and italics in original).

The Kodak handbook's use of the word "should" is grossly uninformative. *Cf. Harris County Hosp. Dist, v. Shalala*, 863 F. Supp. 404, 410 (S.D. Tex. 1994), *aff'd*, 64 F.3d 220 (5th Cir. 1995) ("*Should*," in administrative manual, "is mandatory only when used as the past tense of *shall*. Otherwise, should is precatory.") (emphasis in original). It is not necessary to hold that "should" can never be construed as mandatory. *See Doe v. Hampton*, 566 F.2d 265, 281 (D.C. Cir. 1977) (use of "should" rather than "shall" or "must" is not automatically determinative of whether regulation is mandatory or merely precatory). In this case, however, we decline to equate "should" with "shall" or "must."

Here, Kodak could easily have used unambiguous mandatory language. *See, e.g., Carpenter v. Frontier Corp.*, No. 99-CV-6329T, slip op. at 6 (W.D.N.Y. Mar. 30, 2001) (finding that the plaintiff failed to exhaust her administrative remedies where the denial of claim letter stated that "[s]hould you desire a review, you *must* send a written request . . .") (emphasis added); *see also Gruber*, 195 F. Supp.2d at 717 (the letter "clearly sets forth the procedures and time limit for obtaining a review"). In fact, in at least sixteen places other than the SIB section, Kodak knew how to employ mandatory language. For example, it admonished that "[a]n affidavit of Domestic Partnership *must* be signed by you and your domestic partner." (emphasis added). Moreover, the appeals provision in the handbook does not even suggest the adverse consequences of failing to appeal within ninety days.

Under these circumstances, we conclude that Mrs. Burke was denied the opportunity for the full and fair review contemplated by 29 U.S.C. § 1133 and the DOL regulations.

II. *Mootness*

The Plan Administrators also argue that Mrs. Burke's marriage "mooted" her efforts to qualify as a domestic partner and, consequently, the district court erred in reaching the merits of her claim. Although it did not address this issue, the district court assumed that Mrs. Burke could apply for benefits as either a spouse or domestic partner. *See Burke*, 217 F. Supp.2d at 388. We agree.

The Plan Administrators are vested with discretion to interpret the plan. Accordingly, their interpretation of Mrs. Burke's eligibility under the plan's provisions is subject to the arbitrary and capricious standard of review. *See Kinstler v. First Reliance Standard Life Ins. Co.*, 181 F.3d 243, 249 (2d Cir. 1999).

Their interpretation that Mrs. Burke could not qualify as a domestic partner once she was married smells of the lamp. It does not appear in their denial letter, but was explicitly raised for the first time in the ensuing litigation between the parties. Regardless of timing, their interpretation of domestic partnership and spousal eligibility as mutually exclusive is arbitrary and capricious.

Surprisingly, the Plan Administrators assert that their interpretation is "obvious." However, neither the SIB section, nor the SPD provides that once an otherwise eligible domestic partner marries, the couple forfeits any claim to benefits as domestic partners if the plan participant dies less than a year later. Such a bizarre consequence of entering into a marriage should not be left to inference.

Finally, Kodak's interpretation is not only arbitrary, but probably illegal. If, as the Plan Administrators argue, marriage "moots" domestic partnership status, the plan's requirement means that domestic partners face a year of non-coverage if they decide to get married. This result cannot be condoned. As Mrs. Burke correctly points out, "it

would be blatantly discriminatory . . . to provide for a forfeiture of benefits by reason of marriage alone for an otherwise qualified and eligible beneficiary."

The district court was therefore correct to consider whether Mrs. Burke could apply for benefits as either a spouse or domestic partner.

III. *Mrs. Burke's ERISA Claims*

A. *Standard of Review*

We review a grant of summary judgment *de novo*, "examining the evidence in the light most favorable to, and drawing all inferences in favor of, the non-movant." *See, e.g,, IBM Corp. v. Liberty Mut. Fire Ins. Co.*, 303 F.3d 419, 423 (2d Cir. 2002). Summary judgment is appropriate only if it can be established "that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c) .

The parties agree that the arbitrary and capricious standard of review applies to the Plan Administrators' decision to deny benefits to Mrs. Burke for her failure to comply with the domestic partnership affidavit requirement. Under this deferential standard, we can reverse their decision only if it is without reason, unsupported by substantial evidence, or erroneous as a matter of law. *See, e.g., Celardo v. GNY Auto. Dealers Health & Welfare Trust*, 318 F.3d 142, 146 (2d Cir. 2003). Despite the parties' agreement, however, the standard of review to be applied when the question is whether the SPD complies with ERISA's disclosure requirements is not so clear. At least one court has applied a *de novo* standard. *See Rhorer v. Raytheon Eng's & Contractors Inc.*, 181 F.3d 634, 639 (5th Cir. 1999). We have not decided the applicable standard. *See Layaou v. Xerox Corp.*, 238 F.3d 205, 211-12 (2d Cir. 2001) ("Because we find that Xerox's SPD failed to provide adequate notice . . . under either an arbitrary and capricious or *de novo* standard

of review . . . we express no view on whether the deferential standard . . . is applicable to a Plan administrator's interpretation of an SPD, where it has been determined that the SPD violates the disclosure requirements of [ERISA]."). Nor are we required in this case to resolve the applicable standard because, as in *Layaou*, Mrs. Burke would prevail under either standard.

B. *ERISA Requirements*

ERISA requires employers to distribute SPDs describing the plan's benefits to their employees. 29 U.S.C. §§ 1022(a) & 1024(b). The SPD must be written in a manner calculated to be understood by the average plan participant and must be sufficiently accurate and comprehensive to apprise participants and beneficiaries of their rights and obligations under the plan. *Id.* at § 1022(a). Significantly, the SPD must contain the plan's eligibility requirements for benefits as well as "the circumstances which may result in disqualification, ineligibility or denial or loss of benefits." *Id.*, at § 1022(b); *see also* 29 C.F.R. § 2520.102-3(l).

ERISA further requires that: (1) the SPD's format not mislead or fail to inform participants and beneficiaries about the plan; and (2) any limitations or restrictions of plan benefits must not be minimized, rendered obscure, or otherwise made to appear unimportant. *See* 29 C.F.R. § 2520.102-2(b). Restrictions on benefits need not be disclosed "in close conjunction with the description or summary of benefits provided that adjacent to the benefit description the page on which the restrictions are described is noted." *Id.* ("cross-referencing" requirement); *see also id.* at § 2520.102-2(a) ("the use of clear cross-references [is] usually required" in an SPD).

Where the terms of a plan and the SPD conflict, the SPD controls. *See Heidgerd v. Olin Corp.*, 906 F.2d 903, 907-08 (2d Cir. 1990). This may be startling at first blush but it makes sense when it is recalled that the SPD "will be

an employee's primary source of information regarding employment benefits, and employees are entitled to rely on the descriptions contained in the summary." *Id.* at 907.

C. *Kodak's SPD*

Kodak does not dispute that the Burkes would have satisfied the requirements for domestic partnership, if only they had filed the domestic partnership affidavit. Mrs. Burke argues that this requirement cannot be applied to her because it was not mentioned in the SIB section. We agree.

The district court noted that the eligibility requirements for domestic partnership status are spelled out sixteen times in various benefits sections of the SPD. *Burke*, 217 F. Supp.2d at 389. In all sixteen places, this affidavit requirement states:

> An affidavit of Domestic Partnership must be signed by you and your domestic partner, and filed with Kodak in order to qualify your domestic partner for plan benefits.

The affidavit must also be prepared on a form provided by the Plan Administrator.

Emphasizing the explicit domestic partnership requirements in sixteen sections of the SPD, the district court concluded that, when "read as a whole . . . . the affidavit requirement could not have been set forth more clearly." *Burke*, 217 F. Supp.2d at 389. However, the fact remains that none of these references is noted under SIB, which appears as a self-contained section in a 300 page handbook. Because the relevant section of the SPD omits the affidavit requirement, it conflicts with the Plan. Thus, the SPD controls. *See Heidgerd*, 906 F.2d at 908.

Significantly, of the sixteen references in the SPD, four pertain to health care, four to dental insurance, seven to dependent life insurance, and one to long-term care health

insurance. As noted above, however, the SIB section of the SPD does *not* contain a cross-reference to the affidavit requirement. A cross-reference would have required minimal effort and diligence to insert. A plan participant should not be expected to infer the eligibility requirements for SIB by reference to other self-contained benefits sections of the SPD. *Cf.* 29 C.F.R. § 2520.102-2(a)-(b) (where a restriction on benefits is not "in close conjunction" with a description of the benefits, cross-referencing is generally required).

Curiously, the SIB section that discusses benefits for eligible domestic partners never defines who are "domestic partners." Two subsequent paragraphs, in contrast, provide detailed definitions of "dependent child" and "dependent parent." Participants could therefore reasonably conclude that there were no detailed requirements for other eligible SIB beneficiaries, such as domestic partners.

The Plan Administrators cite *Estate of Becker v. Eastman Kodak Co.*, 120 F.3d 5 (2d Cir. 1997), for the proposition that the flaw in the SPD in this case was cured by Kodak's 1996 Newsletter and 1997 Benefits Update where the domestic partnership affidavit requirement surfaced. The loosest reading of *Becker* does not sanction the use of corporate literature to cure a deficient SPD. Furthermore, even if the Newsletter or Benefits Update were regarded as a proper Summary of Material Modifications under 29 § U.S.C. 1024(b)(1), we would still reject Kodak's argument. Both the Benefits Update and Newsletter were eventually superseded by a formal amendment of the SPD. Notably, its SIB section was not revised to include the affidavit requirement.

For these reasons, we find that Kodak's SPD failed to comply with the requirements of ERISA.

IV. *The Prejudice Standard*

Whether ERISA requires the beneficiary to demonstrate reliance upon a deficient SPD is a question of law we review *de novo*. *See Long v. Flying Tiger Line, Inc. Fixed Pension Plan for Pilots*, 994 F.2d 692, 694 (9th Cir. 1993) ("The interpretation of ERISA, a federal statute, is a question of law subject to *de novo* review."). The district court held that the "plaintiff has failed to demonstrate that she relied to her detriment on the plan and the parts now claimed to be deficient." *See Burke*, 217 F. Supp.2d at 390. We disagree that the record precludes a finding of detrimental reliance. However, we now adopt a prejudice standard; and we find that the Burkes were prejudiced as a matter of law.

The circuits are divided over whether detrimental reliance or prejudice is required to recover in deficient SPD cases. The Third, Seventh and Eleventh Circuits require detrimental reliance. *See Gridley v. Cleveland Pneumatic Co.*, 924 F.2d 1310, 1319 n.8 (3rd Cir. 1991); *Andersen v. Chrysler Corp.*, 99 F.3d 846, 859 (7th Cir. 1996); *Branch v. G. Bernd Co.*, 955 F.2d 1574, 1578-79 (11th Cir. 1992). These courts generally require an affirmative showing by the plaintiff that he read the SPD and that but for the inaccurate description he would have acted differently. *See, e.g., Collins v. Am. Cast Iron Pipe Co.*, 105 F.3d 1368, 1371 (11th Cir. 1997). The First, Fourth, Eighth and Tenth Circuits allow recovery upon a showing of *either* reliance *or* prejudice. *See Govoni v. Bricklayers, Masons & Plasterers Int'l. Union of Am., Local No. 5 Pension Fund*, 732 F.2d 250, 252 (1st Cir. 1984); *Aiken v. Policy Mgmt. Sys. Corp.*, 13 F.3d 138, 141-42 (4th Cir. 1993) (*per curiam*); *Palmisano v. Alina Health Sys., Inc.*, 190 F.3d 881, 887-88 (8th Cir. 1999); *Chiles v. Ceridian Corp.*, 95 F.3d 1505, 1519 (10th Cir. 1996). The Fifth and Sixth Circuits in *dicta* would require neither reliance nor prejudice. *See Hansen v. Cont'l Ins. Co.*,

940 F.2d 971, 983 (5th Cir. 1991); *Edwards v. State Farm Mut. Auto. Ins. Co.*, 851 F.2d 134, 137 (6th Cir. 1988).

This Court has not squarely decided what the appropriate standard is. *See Feifer v. Prudential Ins. Co.*, 306 F.3d 1202, 1213 (2d Cir. 2002) (declining to decide whether *either* factor is required in claim based on a deficient SPD); *see also Layaou v. Xerox Corp.*, 238 F.3d 205, 212 (2d Cir. 2001); *Heidgerd v. Olin Corp.*, 906 F.2d 903, 909 (2d Cir. 1990); *Howard v. Gleason Corp.*, 901 F.2d 1154, 1161 (2d. Cir. 1990). As a result, there is disagreement in the district courts of this Circuit over the proper legal standard. *See, e.g., Moriarity v. United Tech. Corp. Represented Employees Ret. Plan*, 947 F. Supp. 43, 52 (D. Conn. 1996) (applying a detrimental reliance standard), *aff'd*, 158 F.3d 157 (2d Cir. 1998); *Maginaro v, Welfare Fund of Local 771, I.A.T.S.E.*, 21 F. Supp.2d 284, 296-297 (S.D.N.Y. 1998) (allowing recovery for "either detrimental reliance or possible prejudice"); *Estate of Ritzer v. Nat'l Org. of Indus. Trade Unions Ins. Trust Fund Hosp., Med., Surgical Health Benefit*, 822 F. Supp. 951, 955 (E.D.N.Y. 1993) (applying a "high probability of prejudice" standard); *see also Layaou*, 238 F.3d at 212 (noting that "[t]he district courts in this Circuit that have addressed this issue have also reached differing conclusions."). To promote consistency, we must now decide the appropriate standard.

At the outset, we agree that a prejudice standard is more consistent with ERISA's objective to protect the employee against inadequate SPDs. "A rule requiring . . . detrimental reliance . . imposes an insurmountable hardship on many plaintiffs," especially on the estate of a deceased participant, and "[s]uch a rule hardly advances the Congressional purpose of protecting the beneficiaries of ERISA plans by insuring that employees are fully and accurately apprised of their rights under the plan." *Estate of Ritzer*, 822 F. Supp. at 955-56; *see also Springs Valley Bank*

& Trust Co. v. Carpenter, 885 F. Supp. 1131, 1139 (S.D. Ind. 1993) (application of the traditional detrimental reliance test would thwart the substantive objective of ERISA's SPD requirement); *cf. Edwards*, 851 F.2d at 137 ("Congress has promulgated clear directives prohibiting misleading [SPDs] . . . . This court elects not to undermine the legislative command by imposing technical requirements upon the employee.").

We recognize that courts apply the amorphous prejudice standard with varying degrees of stringency. *Compare, e.g., Palmisano*, 190 F.3d at 887-88 (affirming the district court's finding of no reliance and implicitly viewing reliance and prejudice as synonymous), *with Aiken*, 13 F.3d at 142 (remanding for alternative findings on reliance and prejudice as two distinct standards). In shaping the contours of prejudice, we are sensitive to the general benefits and burdens imposed by ERISA's SPD requirement. The statute and the DOL regulations place the burden on employers to draft an SPD that is accurate, comprehensible, and clear regarding restrictions on eligibility for benefits. *See* 29 U.S.C. §§ 1022(a), 1022(b), 1024(b); 29 C.F.R. §§ 2520.102-2(b), 2520.102-3.

The consequences of an inaccurate SPD must be placed on the employer. The individual employee is powerless to affect the drafting and less equipped to absorb the financial hardship of the employer's errors. *See Hanson*, 940 F.2d at 982. The employer, however, receives a substantial benefit in return: a defense against certain state law claims. *Id.* (employer benefits from "protection afforded by ERISA's preemption of state law causes of action . . . which threaten considerably greater liability than that allowed by ERISA"); *see also* 29 U.S.C. § 1144(a) (ERISA provisions "supersede any and all State laws insofar as they may . . . relate to any employee benefit plan"); *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 45-46 (1987) (preemption

provisions are "deliberately expansive and designed to 'establish pension plan regulation as exclusively a federal concern'") (internal citation omitted).

Cognizant of ERISA's distribution of benefits, we require, for a showing of prejudice, that a plan participant or beneficiary was *likely* to have been harmed as a result of a deficient SPD. Where a participant makes this initial showing, however, the employer may rebut it through evidence that the deficient SPD was in effect a harmless error.

The facts of *Maginaro v. Welfare Fund of Local 771, I.A.T.S.E.*, 21 F. Supp.2d 284 (S.D.N.Y. 1998), provide a useful illustration. In that case, the plan itself imposed a two-year statute of limitations on legal actions against an employee welfare fund. The SPD, however, omitted any mention of the statute of limitations. The normal statute of limitations under New York law would have been six years. *Id.* at 293.

The district court ruled, in accordance with Second Circuit precedent, that because the plan and the SPD were in conflict, the SPD controlled. Noting a division in the circuits over whether reliance or prejudice was required for recovery, the court adopted a "possible prejudice" approach. Applying that standard revealed that "plaintiffs were likely prejudiced by the SPD's failure to disclose the limitation on actions contained in the Plan" because New York's statute of limitations allowed an additional four years to sue. *Id.* at 296. The court then concluded that "[h]ad the Fund adequately disclosed the two-year limitation . . . via the SPD, it is likely that [the plaintiff] would have learned of this limitation from his employer, his coworkers, or the union, even if he never read the SPD himself." *Id.* at 297.

This "likely prejudice" standard avoids the use of harsh common law principles to defeat employees' claims based on a federal law designed for their protection. The

result is a presumption of prejudice in favor of the plan participant after an initial showing that he was likely to have been harmed. The *Maginaro* court noted, however, that "[d]efendants could have rebutted this presumption of prejudice by showing, *inter alia*, that plaintiffs were aware of the Plan's two-year limitation on actions." *Id.* at 297 n.7.

In this case, the relevant section of Kodak's SPD failed to mention the affidavit of domestic partnership requirement contained in the plan itself. Therefore, the SPD controls. The unresolved question is whether the Burkes were "likely prejudiced." We find that they were. The conspicuous absence of the domestic partnership affidavit requirement in the self-contained SIB section likely led the Burkes to believe that an affidavit was unnecessary for SIB benefits.

The Plan Administrators seek to rebut this presumption through the same evidence used by the district court to find a lack of detrimental reliance: the Burkes consciously decided not to apply for domestic partnership status for Kodak *health care* benefits due to their concern that Mrs. Burke would not be covered for her pre-existing stroke-related illness. Therefore, the Plan Administrators claim, the Burkes neither relied on, nor were prejudiced by, the SPD.

However, the evidence in the record is inadequate to rebut the presumption of prejudice to the Burkes. Due to Kodak's omission, the Burkes were likely to believe that there was no affidavit prerequisite for SIB. Moreover, the Burkes' decision to forgo Kodak health care benefits would not have prevented their application for SIB.

The Plan Administrators also argue that Kodak's Newsletter and Benefits Update provided sufficient notice to the Burkes of the domestic partnership affidavit requirement. However, when viewed in the light most favorable to the Plan Administrators, the record does not establish that the

Burkes viewed these documents. Even if the Burkes had viewed these documents, they were entitled to rely on the subsequently issued SPD, which was not revised to include the affidavit requirement.

Finally, the record affirmatively supports a finding of likely prejudice. Mr. Burke designated Mrs. Burke as the primary beneficiary of his Kodak-provided life insurance, his Savings and Investment Plan Account, and his Employee Stock Ownership Plan Account. Therefore, his forfeiture of substantial lifetime benefits for his disabled domestic partner, and later spouse, is belied by his prudence in other Kodak benefits decisions.

Applying a likely prejudice standard for deficient SPD cases, we conclude that the Burkes suffered prejudice as a result of Kodak's deficient SPD.

CONCLUSION

For the foregoing reasons, we AFFIRM in part and REVERSE and REMAND in part, with instructions to the district court to enter judgment for Mrs. Burke.

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

SALLY J. BURKE,

Plaintiff,

v.

KODAK RETIREMENT INCOME PLAN, and
KODAK RETIREMENT INCOME PLAN COMMITTEE,

Defendant.

00-CV-6596L

July 31, 2002

Introduction

In this action, plaintiff Sally J. Burke (hereinafter "plaintiff") claims that the Kodak Retirement Income Plan (hereinafter "KRIP") and the Kodak Retirement Income Plan Committee (hereinafter "KRIPCO") (collectively "defendants") wrongfully denied her application for pre-retirement survivor income benefits (hereinafter "SIB"), which she claimed when her husband died in November, 1999.

Both plaintiff and defendants now move, under Fed. R. Civ. P. 56, for summary judgment. For the reasons that follow, plaintiff's motion is denied, defendants' cross-motion is granted, and plaintiff's complaint is dismissed with prejudice.

Factual Background

At the time of his death, plaintiff's husband, Kenneth Burke (hereinafter "Burke"), had been employed by Eastman Kodak ("Kodak") for twenty-seven years. Deposition of Sally J. Burke, May 23, 2001, pp. 64 (hereinafter "Plaintiff s Deposition"). In 1991, Burke and plaintiff began living together, and thereafter maintained joint bank accounts and made joint purchases. Affidavit of Sally J. Burke, sworn to on 21st of February, 2002, ¶5-11 (hereinafter "Plaintiff's Affidavit"). They also shared expenses and were responsible for the support and maintenance of their children from prior marriages. *Id.*

Burke was diagnosed with lung cancer in March, 1999. Plaintiff's Deposition, pp. 46. Following his diagnosis, he began receiving short-term disability benefits from Kodak, but did not retire. Burke and plaintiff were married on May 17, 1999. *Id.* at pp. 44. Burke died of cancer on November 9, 1999. *Id.* at pp. 50.

Shortly after Burke's death, Diane Fagan, Kodak's Benefits Administrator, sent a letter to plaintiff detailing the benefits that she might be eligible to receive. Dkt. #18, Exhibit B. In the letter, Fagan instructed plaintiff that SIB would begin after plaintiff provided Kodak with a "Dependent Verification Form," a copy of her marriage certificate, a copy of her birth certificate and a copy of Burke's death certificate. *Id.* The letter stated "You are eligible to receive [SIB] . . . as long as you have been married to Kenneth for at least one year." *Id.* Upon discovering that plaintiff had been married to Burke for less than one year, on November 23, 1999, Fagan sent a second letter to plaintiff indicating that she was not eligible for SIB. Ms. Fagan did advise, however, that survivor benefits would be payable to Burke's dependent children. Dkt. #18, Exhibit E. Included

with this letter was a copy of a booklet entitled, *You & Kodak.*[1]

According to the booklet, which was, as discussed *infra,* the SPD, an appeal from a denial of benefits, must be filed within ninety (90) days of the denial.

> If you remain dissatisfied and wish to appeal, you should, within 90 days of the date the claim was denied (or within 90 days of the date the claim is assumed to be denied), write a letter to the plan administrator asking for a review.

You & Kodak, pp. 334.

Plaintiffs' attorney appealed the denial of SIB in a letter dated July 20, 2000. Dkt. #18, Exhibit G. In the letter, he acknowledged the tardiness of the appeal, citing that the "emotional state of Ms. Burke upon the death of her husband" delayed her application for appeal. *Id.* He also claimed, for the first time, that plaintiff qualified for SIB as a "domestic partner." *Id.*

Plan Administrator Pamela Cromp reviewed plaintiffs appeal. Cromp's Deposition, pp. 6. She denied plaintiff's appeal on August 7, 2000, citing both the untimeliness of plaintiff's appeal, and the fact that plaintiff did not meet the eligibility requirements to receive SIB as either a spouse or a domestic partner. Dkt. #18, Exhibit G.

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[1] *You & Kodak is* a publication of over 334 pages, containing sections entitled Advantage/Flex Plan, Health Care, Dental, Reimbursement Accounts, Vacation Buy, Life Insurance, Accidental Death Insurance, Long-Term Disability, Long-Term Care, Other Income Protection, Leaves of Absence, Work and Family, Retirement Income (specifically KRIP), Wage Dividends, Investment Plans, Leisure Time, and General Information.

Discussion

On a motion for summary judgment, a court's responsibility is to determine whether there are issues to be tried. *See Joyce v. Curtiss-Wright Corp.*, 171 F.3d 130 (2d. Cir. 1999); *see also Larsen v. NMU* Pension Trust, 902 F.2d 1069, 1073 (2d. Cir. 1990). Summary judgment will be granted if the record demonstrates that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986); *Larsen*, 902 F.2d at 1073. A genuine issue of material fact exists only if the record, taken as a whole, could lead a reasonable trier of fact to find in favor of the non-movant. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

Standard of Review

Plaintiff's suit for benefits was commenced pursuant to § 502(a)(1)(B) of the Employee Retirement Income Security Act of 1974 ("ERISA"). This section permits a plan participant or beneficiary to sue to recover benefits due under the terms of the applicable plan.

In this case, the administrator of the applicable plan denied plaintiff's claim for benefits and, therefore, the issue before the district court is whether that denial was proper under ERISA. The parties do not dispute that under the terms of the plan at issue here, the arbitrary and capricious standard of review applies. *See Kinstler v. First Reliance Std. Life Ins. Co.*, 181 F.3d 243 (2d. Cir. 1999) (holding that where a benefit plan reserves to the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan, denials of benefits challenged under § 1132(a)(1)(B) are subject to the deferential arbitrary and capricious standard); *see also Firestone Tire and Rubber Co. v. Bruch*, 489 U.S. 101, 115 (1989).

"The arbitrary and capricious standard of review is highly deferential to a plan administrator. The question before a reviewing court under this standard is whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *See Jordan v. Retirement Committee of Rensselaer Polytechnic Institute,* 46 F.3d 1264, 1271 (2d Cir. 1995) (quoting *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 285 (1974)). Under this standard, a Plan Administrator's decision to deny benefits "may be overturned only if the decision is 'without reason, unsupported by substantial evidence or erroneous as a matter of law.'" *See Kinstler,* 181 F.3d at 249 (quoting *Pagan v. NYNEX Pension Plan*, 52 F.3d 438, 442 (2d Cir. 1995)). A district court may not substitute its judgment for that of the Plan Administrator, and a court's review under the arbitrary and capricious standard is limited to the administrative record. *See Wojciechowski v. Metropolitan Life Ins.* Co., 75 F. Supp.2d 256, 262 (S.D.N.Y. 1999).

Eligibility for Survivor Income Benefits

Under the plan at issue, there are several categories of survivors who are entitled to receive SIB benefits. Two of those – surviving spouse or surviving domestic partner – are at issue here. There are certain conditions, though, that must be met in order to establish entitlement to the SIB benefit. Unfortunately for plaintiff, she failed to meet the requirements to receive benefits as a surviving spouse or as a domestic partner.

In 1997, Kodak distributed an employee handbook entitled *You & Kodak Employee Handbook* (hereinafter "*You & Kodak*") to all its employees as the summary plan document (hereinafter "SPD") for all benefit plans offered by Kodak, including KRIP. Deposition of Pamela Cromp, October 10, 2001, pp. 23 (hereinafter "Cromp's

Deposition"). At all times relevant to this suit, this SPD was in effect. Cromp's Deposition, pp. 16.

One of the benefits offered to KRIP participants was SIB, which provided a percentage of an employee's retirement income benefit to "an eligible spouse, domestic partner, dependent child or dependent parent" at the time of the employee's death. *You & Kodak,* pp. 271-272. Kodak extended SIB eligibility to domestic partners effective January 1, 1997, citing Kodak's equal employment opportunity policy which "promotes equal treatment of employees regardless of marital status or sexual orientation." *You & Kodak News,* Dkt. #18, Exhibit 1, pp. 4.

Under KRIP, a spouse becomes eligible for SIB after being married to a plan participant *for one year or more* prior to that participant's death. *You & Kodak*, pp. 272. Those regarded as eligible domestic partners under KRIP are two people of the same or opposite sex in a spouse-like relationship who have met all of the following requirements for at least one year prior to collecting benefits. The requirements are that the parties:

> (1) intend to remain each other's domestic partner indefinitely;
>
> (2) reside together in the same permanent residence;
>
> (3) are emotionally committed to one another and are jointly responsible for the common welfare and financial obligations of the household, or the domestic partner is chiefly dependent upon the employee for care and financial assistance;
>
> (4) are not legally married to anyone else and are not the domestic partner of anyone else;

> (5) are not related by blood closer than would bar marriage under applicable law; and
>
> (6) are both at least 18 years of age and mentally competent to enter into a legal contract.

You and Kodak, pp. 200 *et seq.* Additionally, KRIP requires that an affidavit of domestic partnership be signed by both the plan participant and his/her domestic partner and that affidavit must be filed with Kodak. *Id.*; Dkt. #18, Exhibit L, pp. 19.

In addition to the revised SPD issued in 1997, the decision to extended [sic] SIB to domestic partners was publicized in two separate Kodak publications: "You & Kodak News" (published Winter, 1996) and "You & Kodak Benefits Update" (published July, 1997), the ERISA-mandated summary of material modifications. Dkt. #18, Exhibits I & J. Both publications listed the prerequisites for domestic partnership status, including the affidavit requirement. *Id.*

The critical issue before the Court is whether or not plaintiff was entitled to SIB at the time of her husband's death either as a surviving spouse or as a surviving domestic partner. The SPD reads: "If the [SIB] is payable to your spouse, you must have been married for at least one year prior to your death." *You & Kodak*, pp. 272. The SPD is quite clear as to the eligibility requirements for a spouse who wishes to collect SIB. It is undisputed that plaintiff and Burke had only been married for about five months, from May 17, 1999 to November 9, 1999, when Burke died. Burke's Deposition, pp. 44, 50. They were not married for a year, and hence plaintiff was not eligible to receive SIB at the time of her husband's death, as a surviving spouse. The denial of benefits was based upon the provisions of KRIP, and involved no arbitrary or capricious decision by KRIPCO.

Plaintiff's alternative claim, that she should receive benefits because of her prior relationship with Burke, fares no better. Plaintiff and Burke failed to meet the clear requirements for "domestic partners." Plaintiff and Burke did not fulfill the plan's requirements for establishing their status as "domestic partners" because they never filed the requisite affidavit of domestic partnership, signed by both parties, attesting to their relationship, which must have been in existence for at least one year. This affidavit requirement is clearly set forth in the SPD. On my review, that requirement was referenced in at least sixteen different places in the SPD. *See You & Kodak*, pp. 39, 46, 49, 59, 80, 82, 92, 138, 153, 160, 166, 176, 177, 181, 183 and 200.

It is well established that an SPD must be read as a whole and that single sentences or paragraphs do not control. "It [is] error to attend only to one paragraph, page, or portion of the summary." *See Hansen v. Continental Ins. Co.*, 940 F.2d 971, 981 (5th Cir. 1991) (citing *Sharron v. Amalgamated Ins. Agency Servs., Inc.*, 704 F.2d 562, 566-67 (11th Cir. 1983)) (To "focus on only one page of the summary [would] represent an unrealistically narrow view of how a reasonably prudent employee would read and review this important document."); *see also Estate of Becker v. Eastman Kodak Co.*, 120 F.3d 5, 8 (2d. Cir. 1997). Under this standard, the affidavit requirement could not have been set forth more clearly.

Furthermore, it is evident that Burke and plaintiff were aware that Kodak had adopted a plan to provide benefits for domestic partners, but plaintiff and Burke affirmatively made the decision not to take steps to establish their domestic partnership. At her deposition, plaintiff stated that she and Burke were aware that Kodak had started making benefits available to domestic partners. At the time, plaintiff was employed by the University of Rochester and they elected not to obtain benefits as domestic partners under

Kodak's plan because plaintiff was reluctant to switch to Kodak's plan because she was afraid it might not cover pre-existing medical conditions which had been covered by her employer. Plaintiff s Deposition, pp. 76-77. From this record, it appears clear that plaintiff and Burke were aware of the new provisions in Kodak's plans which provided for benefits to domestic partners, but they elected not to pursue the requirements for achieving such status.

Plaintiff and Burke failed to meet the requirements for domestic partners, and plaintiff also failed to meet the one-year marriage requirement to qualify as a surviving spouse. Therefore, the administrator properly denied SIB benefits.

The fact that plaintiff lived with Burke for an extended period of time prior to their marriage does not by itself establish eligibility. Plaintiffs partial compliance with the requirements for both domestic partnership and for that of a surviving spouse does not add up to complete compliance with the requirements for establishing either.

Lack of Reliance

I believe that the SPD adequately informed employees and beneficiaries of the requirements for obtaining benefits as either a domestic partner or a surviving spouse. But, even if were [sic] to find some deficiency, plaintiff has failed to demonstrate that she relied to her detriment on the plan and the parts now claimed to be deficient.

Even assuming, *arguendo,* that I were to find that You & Kodak was deficient in either respect, I find no evidence that plaintiff or her husband detrimentally relied upon the plan. In fact, plaintiff testified that she never reviewed the SPD, and that her husband's decision not to list her as a domestic partner was an affirmative decision so as not to jeopardize health insurance coverage. Plaintiff's

Deposition, pp. 72, 76-77. *See Moriarity v. United Techs. Corp. Represented Employees Retirement Plan,* 947 F.Supp. 43, 53 (D.Conn. 1996) ("Without having read the SPD, plaintiff could not have relied on it or been prejudiced or misled by its contents."), aff'd, 158 F.3d 157 (2d Cir. 1998). There is simply no evidence to support plaintiff's assertion that she detrimentally relied on the SPD at any point.

Exhaustion of Remedies

Although unnecessary for resolution of this case, I reject defendants' contention that the case should be dismissed because plaintiff failed to exhaust her administrative remedies. Defendants contend that plaintiff s failure to appeal the denial of her claim within the ninety-day period precludes review in federal court.

There is ample authority requiring that a participant must exhaust all administrative remedies open to her before bringing a federal action. *See Alfarone v. Bernie Wolff Construction,* 788 F.2d 76, 79 (2d. Cir.) (recognizing "the firmly established federal policy favoring exhaustion of administrative remedies in ERISA cases."), *cert. denied,* 479 U.S. 915 (1986); *see also Kennedy v. Empire Blue Cross and Blue Shield,* 989 F.2d 588, 593 (2d. Cir. 1993) (citing *Amato v. Bernard,* 618 F.2d 559, 567 (9th Cir. 1980)) (requirement that plan provides remedies suggests Congress' intent to have courts require exhaustion of these remedies). However, where the denial instrument fails to comply with 29 U.S.C. § 1133 and its regulations[2], a time bar contained within a plan is not triggered. *See White v. Jacobs Eng'g Group Long Term Disability Benefit Plan,* 896 F.2d 344, 349-50 (9th Cir. 1989); *see also Challenger v. Local Union No. 1 of Int'l Bridge, Structural and Ornamental Ironworkers, AFL-CIO,*

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[2] 29 C.F.R. § 2520.102-3(1), 29 C.F.R. § 2520.102-3(j)(1).

619 F.2d 645, 648 (7th Cir. 1980). If a denial notice substantially complies with regulations, it will satisfy 29 U.S.C. § 1133 despite any technical deficiencies in its structure. *See Diagnostic Medical Associates, M.D., P. C. v. Guardian Life Ins. Co. of America,* 157 F. Supp.2d 292, 299 (S.D.N.Y. 2001) (citing *Halpin v. W. W. Grainger, Inc.*, 962 F.2d 685, 690 (7th Cir.1992)).

The exhaustion requirement, however, is only applicable if the claimant is properly apprised of the opportunity to pursue such remedies. Plaintiff was not given proper notice here and, therefore, her apparently tardy administrative appeal does not preclude federal court review. I find that the plan administrators failed to give plaintiff proper notice when they initially denied her claim of the ninety-day filing requirement for an appeal. That error constituted a failure to comply with 29 U.S.C. § 1133 and the regulations adopted to implement that section.

I find that the mere inclusion of *You & Kodak* with the denial letter is not substantial compliance with defendants' obligation to afford plaintiff an opportunity for full and fair review of the denial. 29 U.S.C. § 1133(b); *see Kent v. United of Omaha Life Ins.* Co., 96 F.3d 803, 808 (6th Cir. 1996) ("When claim communications as a whole are sufficient to fulfill the purposes of § 1133, the claim decision will be upheld even if a particular communication does not meet those requirements. This rule . . . appropriately recognizes that once the purposes of § 1133 are met, justice does not require, indeed it forbids, the reversal of a claim decision based on a technical defect.").

Because of the lack of notice, I have considered the merits of plaintiff s claims, and I decline to default plaintiff on procedural grounds because of her delay in filing her appeal with the administrator from the initial denial.

Conclusion

Plaintiff's motion for summary judgment (Dkt. #7) is denied, and defendants' cross-motion for summary judgment (Dkt. #15) is granted. The complaint is dismissed with prejudice.

IT IS SO ORDERED.

STATUTORY PROVISIONS INVOLVED

1. Section 3 of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1002, provides in relevant part:

> **§ 1002. Definitions**
>
> For purposes of this subchapter:
>
> (1) The terms "employee welfare benefit plan" and "welfare plan" mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (B) any benefit described in section 186(c) of this title (other than pensions on retirement or death, and insurance to provide such pensions).
>
> (2)(A) Except as provided in subparagraph (B), the terms "employee pension benefit plan" and "pension plan" mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that by its express terms or as a result of surrounding circumstances such plan, fund, or program –

(i) provides retirement income to employees, or

(ii) results in a deferral of income by employees for periods extending to the termination of covered employment or beyond,

regardless of the method of calculating the contributions made to the plan, the method of calculating the benefits under the plan or the method of distributing benefits from the plan.

(B) The Secretary may by regulation prescribe rules consistent with the standards and purposes of this chapter providing one or more exempt categories under which –

(i) severance pay arrangements, and

(ii) supplemental retirement income payments, under which the pension benefits of retirees or their beneficiaries are supplemented to take into account some portion or all of the increases in the cost of living (as determined by the Secretary of Labor) since retirement,

shall, for purposes of this subchapter, be treated as welfare plans rather than pension plans. In the case of any arrangement or payment a principal effect of which is the evasion of the standards or purposes of this chapter applicable to pension plans, such arrangement or payment shall be treated as a pension plan.

(3) The term "employee benefit plan" or "plan" means an employee welfare benefit plan or an employee pension benefit plan or a plan which is both an employee welfare

benefit plan and an employee pension benefit plan.

* * *

2. Section 102 of ERISA, 29 U.S.C. § 1022, provides in relevant part:

> **§ 1022. Summary plan description**
>
> (a) A summary plan description of any employee benefit plan shall be furnished to participants and beneficiaries as provided in section 1024(b) of this title. The summary plan description shall include the information described in subsection (b) of this section, shall be written in a manner calculated to be understood by the average plan participant, and shall be sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of their rights and obligations under the plan. A summary of any material modification in the terms of the plan and any change in the information required under subsection (b) of this section shall be written in a manner calculated to be understood by the average plan participant and shall be furnished in accordance with section 1024(b)(1) of this title.
>
> (b) The summary plan description shall contain the following information: The name and type of administration of the plan; in the case of a group health plan (as defined in section 1191b(a)(1) of this title), whether a health insurance issuer (as defined in section 1191b(b)(2) of this title) is responsible for the financing or administration (including payment of claims) of the plan and (if so) the

name and address of such issuer; the name and address of the person designated as agent for the service of legal process, if such person is not the administrator; the name and address of the administrator; names, titles, and addresses of any trustee or trustees (if they are persons different from the administrator); a description of the relevant provisions of any applicable collective bargaining agreement; the plan's requirements respecting eligibility for participation and benefits; a description of the provisions providing for nonforfeitable pension benefits; circumstances which may result in disqualification, ineligibility, or denial or loss of benefits; the source of financing of the plan and the identity of any organization through which benefits are provided; the date of the end of the plan year and whether the records of the plan are kept on a calendar, policy, or fiscal year basis; the procedures to be followed in presenting claims for benefits under the plan including the office at the Department of Labor through which participants and beneficiaries may seek assistance or information regarding their rights under this chapter and the Health Insurance Portability and Accountability Act of 1996 with respect to health benefits that are offered through a group health plan (as defined in section 1191b(a)(1) of this title) and the remedies available under the plan for the redress of claims which are denied in whole or in part (including procedures required under section 1133 of this title).

* * *

3. Section 402 of ERISA, 29 U.S.C. § 1102, provides in relevant part:

> **§ 1102. Establishment of plan**
>
> **(a) Named fiduciaries**
>
> (1) Every employee benefit plan shall be established and maintained pursuant to a written instrument. Such instrument shall provide for one or more named fiduciaries who jointly or severally shall have authority to control and manage the operation and administration of the plan.
>
> (2) For purposes of this subchapter, the term "named fiduciary" means a fiduciary who is named in the plan instrument, or who, pursuant to a procedure specified in the plan, is identified as a fiduciary (A) by a person who is an employer or employee organization with respect to the plan or (B) by such an employer and such an employee organization acting jointly.
>
> **(b) Requisite features of plan**
>
> Every employee benefit plan shall –
>
> (1) provide a procedure for establishing and carrying out a funding policy and method consistent with the objectives of the plan and the requirements of this subchapter,
>
> (2) describe any procedure under the plan for the allocation of responsibilities for the operation and administration of the plan (including any procedure described in section 1105(c)(1) of this title),

(3) provide a procedure for amending such plan, and for identifying the persons who have authority to amend the plan, and

(4) specify the basis on which payments are made to and from the plan.

* * *

4. Section 502 of ERISA, 29 U.S.C. § 1132, provides in relevant part:

§ 1132. Civil enforcement

(a) Persons empowered to bring a civil action

A civil action may be brought –

(1) by a participant or beneficiary –

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of 1025(c) of this title;

(5) except as otherwise provided in subsection (b) of this section, by the Secretary (A) to enjoin any act or practice which violates any provision of this subchapter, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this subchapter;

(6) by the Secretary to collect any civil penalty under paragraph (2), (4), (5), (6), or (7) of subsection (c) of this section or under subsection (i) or (l) of this section;

(7) by a State to enforce compliance with a qualified medical child support order (as defined in section 1169(a)(2)(A) of this title);

(8) by the Secretary, or by an employer or other person referred to in section 1021(f)(1) of this title, (A) to enjoin any act or practice which violates subsection (f) of section 1021 of this title, or (B) to obtain appropriate equitable relief (i) to redress such violation or (ii) to enforce such subsection; or

(9) in the event that the purchase of an insurance contract or insurance annuity in connection with termination of an individual's status as a participant covered under a pension plan with respect to all or any portion of the participant's pension benefit under such plan constitutes a violation of part 4 of this title or the terms of the plan, by the Secretary, by any individual who was a participant or beneficiary at the time of the alleged violation,

or by a fiduciary, to obtain appropriate relief, including the posting of security if necessary, to assure receipt by the participant or beneficiary of the amounts provided or to be provided by such insurance contract or annuity, plus reasonable prejudgment interest on such amounts.

* * *

(c) Administrator's refusal to supply requested information; penalty for failure to provide annual report in complete form

(1) Any administrator (A) who fails to meet the requirements of paragraph (1) or (4) of section 1166 of this title or section 1021(e)(1) of this title with respect to a participant or beneficiary, or (B) who fails or refuses to comply with a request for any information which such administrator is required by this subchapter to furnish to a participant or beneficiary (unless such failure or refusal results from matters reasonably beyond the control of the administrator) by mailing the material requested to the last known address of the requesting participant or beneficiary within 30 days after such request may in the court's discretion be personally liable to such participant or beneficiary in the amount of up to $100 a day from the date of such failure or refusal, and the court may in its discretion order such other relief as it deems proper. For purposes of this paragraph, each violation described in subparagraph (A) with respect to any single participant, and each violation described in subparagraph (B) with respect to

any single participant or beneficiary, shall be treated as a separate violation.

(d) Status of employee benefit plan as entity

(1) An employee benefit plan may sue or be sued under this subchapter as an entity. Service of summons, subpena, or other legal process of a court upon a trustee or an administrator of an employee benefit plan in his capacity as such shall constitute service upon the employee benefit plan. In a case where a plan has not designated in the summary plan description of the plan an individual as agent for the service of legal process, service upon the Secretary shall constitute such service. The Secretary, not later than 15 days after receipt of service under the preceding sentence, shall notify the administrator or any trustee of the plan of receipt of such service.

(2) Any money judgment under this subchapter against an employee benefit plan shall be enforceable only against the plan as an entity and shall not be enforceable against any other person unless liability against such person is established in his individual capacity under this subchapter.

(2)

No. 03-565

Supreme Court, U.S.
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In The

Supreme Court of the United States

KODAK RETIREMENT INCOME PLAN
and KODAK RETIREMENT
INCOME PLAN COMMITTEE,

Petitioners,

v.

SALLY J. BURKE,

Respondent.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit

BRIEF IN OPPOSITION

GEORGE A. SCHELL, ESQ.
SCHELL & SCHELL, P.C.
410 Perinton Hills Office Park
Fairport, NY 14450
(585) 377-2682

Counsel for Respondent

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTION PRESENTED

When a Summary Plan Description is defective in failing to alert a plan participant of the requirement of the filing of an Affidavit of Domestic Partnership in order to establish eligibility for survivor income benefits payable to a beneficiary upon the death of the plan participant prior to retirement, under an ERISA-covered Retirement Income Plan, was the Second Circuit correct in holding that circumstantial evidence offered by the beneficiary created a rebuttable presumption of likely prejudice as a result of the defect in the SPD entitling the plan beneficiary to Survivor Income benefits upon the failure of the plan administrator to establish proof sufficient to rebut the presumption?

PARTIES TO THE PROCEEDING AND RULE 29.6 LISTING

The Respondent is Sally J. Burke, an individual. Petitioners are Kodak Retirement Income Plan and the Kodak Retirement Income Plan Committee. Neither of the Petitioners is a corporation and, therefore, neither issued any stock that is owned by any publicly-traded company. Eastman Kodak Company is not a party to this case, but is a publicly-held company.

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BRIEF IN OPPOSITION

Respondent, Sally J. Burke, respectfully requests that the Court deny the Petition for a Writ of Certiorari seeking review of the decision of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the Second Circuit Court of Appeals is reported at 336 F.3d 103 and the opinion of the District Court is reported at 217 F.Supp.2d 384.

COUNTER-STATEMENT OF THE CASE

There is no clear irreconcilable conflict among the various Circuit Courts on the issue that was actually decided by the Second Circuit in this case. The primary holding of the Court below involves the burden of proof placed upon a plan beneficiary as well as the Plan Administrator. Virtually every Circuit Court has held that when there is a conflict between a Summary Plan Description and the terms of the pension plan, the SPD controls. The Circuit Courts have imposed some additional requirement of proof in order for the beneficiary to recover under the plan terms. The Second Circuit adopted a "likely prejudice" standard and held that the plan beneficiary has the burden of proof of establishing that she was likely prejudiced by the defect in the SPD. A presumption then arises in favor of the beneficiary after this initial showing that she was likely to have been harmed. This presumption may then be rebutted by the Plan Administrator or employer through evidence that the deficient SPD was, in

effect, a harmless error. No other Circuit Court has dealt with the burden of proof issue and, therefore, there is no clear irreconcilable conflict among the various Circuit Courts on the issue.

Kodak's Retirement Income Plan provides Survivor Income Benefits for certain beneficiaries when the plan participant dies prior to retirement. In 1996, Kodak amended its Pension Plan to include "domestic partners" among the class beneficiaries entitled to Survivor Income Benefits. The terms of the pension plan set forth specific requirements for an individual to be considered a domestic partner under the terms of the plan. It also requires that the plan participant and beneficiary file an Affidavit of Domestic Partnership with the plan administrator attesting to the fact that they have met all of the criteria for being domestic partners. It is undisputed that Kodak publishes and distributes to its employees a company handbook of over 300 pages, which includes SPDs for each of its welfare plans and its SPD for its pension plan. It is further undisputed that the SPD for the pension plan does not alert the plan participant and/or beneficiary of the requirement of the filing of an Affidavit of Domestic Partnership in order to establish eligibility for Survivor Income Benefits on the part of the surviving domestic partner. It is further undisputed that the Respondent and the deceased plan participant met all of the criteria for being domestic partners with the exception of the filing of the Affidavit of Domestic Partnership with the plan administrator prior to the death of the plan participant. It is also undisputed that the issue giving rise to the present litigation did not occur until after the death of the plan participant, which precluded the Respondent from establishing what the plan participant did or did not rely upon

in connection with the defective SPD terms. Respondent seeks to recover Survivor Income Benefits based upon the clear factual establishment of her domestic partnership status, notwithstanding the failure to file the Affidavit of Domestic Partnership prior to the death of the plan participant.

REASONS WHY THE PETITION SHOULD BE DENIED

I. There Is No Clear Irreconcilable Conflict Among The Various Circuit Courts On The Primary Issue Decided By The Second Circuit In This Case.

Virtually all of the Circuit Courts have held that when there is a conflict between an SPD and a Pension Plan, the SPD controls. *Heidgerd v. Olin Corp.*, 906 F.2d 903, 907-08 (2nd Cir. 1990); *Burnstein v. Retirement Plan, Allegheny Health*, 334 F.3d 365, 378 (3rd Cir. 2003); *Pierce v. Security Trust Life Ins. Co.*, 979 F.2d 23, 27 (4th Cir. 1992); *Hansen v. Continental Ins. Co.*, 940 F.2d 971 (5th Cir. 1991); *Edwards v. State Farm Mut. Auto. Ins. Co.*, 851 F.2d 134, 136 (6th Cir. 1988); *Senkier v. Hartford Life and Acc. Ins. Co.*, 948 F.2d 1050 (7th Cir. 1991); *Baker v. Ceridian Corp.*, 122 F.3d 628, 633 (8th Cir. 1997); *Atwood v. Neumont Gold Co.*, 45 F.3d 1317, 1321 (9th Cir. 1995); *Chiles v. Ceridian Corp.*, 95 F.3d 1505, 1515 (10th Cir. 1996); *McKnight v. Southern Life and Health Ins. Co.*, 758 F.2d 1566, 1570 (11th Cir. 1985).

In addition to requiring proof of the defect in the SPD, all Circuit Courts require some additional proof of the effect of that defect prior to recovery by a plan participant

or a beneficiary. The language chosen by the various courts in describing that additional quantum of proof has varied.

Contrary to assertions made by Petitioner in its brief, the Seventh Circuit has not directly held that a showing of detrimental reliance is necessary in order for a beneficiary or plan participant to recover benefits on the basis of a deficient SPD. In all three cases, the statements relied upon by Petitioner were in the form of dicta in the course of an opinion. In *Health Cost Controls of Illinois, Inc. v. Washington*, 187 F.3d 703 (7th Cir. 1999), the issue facing the Court was whether the plan documents entitled the plan to reimbursement for medical expenses that were paid to a participant in accordance with an insurance policy providing coverage for an injury inflicted by an uninsured motorist. The Court held that there was no conflict between the plan provisions and the SPD and that decision was dispositive of the case. Although there are statements made in dicta that are being relied upon by Petitioner herein, the opinion clearly states that the Court was not ruling upon the issue of reliance in connection with conflicts between Summary Plan Documents and the plan wording itself. Specifically, the Court stated: "We need not get into the issue of reliance here, or weigh the significance of the fact that the Summary Plan Description states that 'in case of a conflict or discrepancy between this booklet and the actual Plan provisions, the provisions of the Plan, will govern your rights and benefits,' for there is no conflict between the descriptions." 187 F.3d at 24.

The Seventh Circuit's opinion in *Helfrich v. Carle Clinic Association, PC*, 328 F.3d 915 (7th Cir. 2003) also does not substantiate Petitioner's argument as to the position of the Seventh Circuit on this issue. In that case,

the Court held that the three documents that the Plaintiffs denominated Summary Plan Descriptions were not, in fact, Summary Plan Descriptions and were prepared by the employer rather than the plan. The Court, therefore, rejected the Plaintiff's claim that the brochures prepared and handed out by the employer overrode the terms of the pension plan in the same fashion that a defective Summary Plan Description would. The Court refused to extend the rule applicable to conflicts between Summary Plan Descriptions and plan provisions to other descriptive materials prepared and handed out by the employer to employees.

In *Andersen v. Chrysler Corporation*, 99 F.3d 846 (7th Cir. 1996), the Court declined to apply the general rule that the SPD would govern in conflicts between SPDs and plan provisions by reason of the fact that the plan provisions in the case before it were more favorable to the beneficiaries than were the provisions of the SPD. The Court concluded that the cases where an SPD was enforced over contradictory plan terms were situations where the SPD terms involved were more favorable to the plan participant or beneficiary. Since that was not the case before the Court, those rules of law did not have application.

The Third Circuit previously decided *Gridley v. Cleveland Pneumatic Co.*, 924 F.2d 1310 (3rd Cir. 1991) and held, similar to the Seventh Circuit's decision in *Helfrich v. Carle Clinic Association, PC*, supra, that employer-provided booklets are not Summary Plan Descriptions. Although there was discussion in the opinion thereafter concerning conflicts between Summary Plan Descriptions and plan provisions, such comments were

clearly dicta. In any event, the Third Circuit, upon actually deciding the issue in a case clearly presenting it, held that a plan participant or beneficiary need not allege reliance or prejudice in asserting a claim for plan benefits on the basis of a conflict between an SPD and the plan document, *Burstein v. Retirement Account Plan for Employees of Allegheny Health Education and Research Foundation*, 334 F.3d 365 (3rd Cir. 2003).

Opinions in five circuits have held that a plan participant or beneficiary may recover upon a showing of some degree of reliance or possible prejudice. *Govoni v. Bricklayers, Masons & Plasterers International Union of America, Local No. 5 Pension Fund*, 732 F.2d 250, 252 (1st Cir. 1984); *Aiken v. Policy Management Systems Corp.*, 13 F.3d 138, 141 (4th Cir. 1993); *Palmisano v. Allina Health Systems, Inc.*, 190 F.3d 881, 887-88 (8th Cir. 1999); *Chiles v. Ceridian Corp.*, 95 F.3d 1505, 1519 (10th Cir. 1996).

Although Petitioner asserts that the Sixth Circuit requires a participant or beneficiary to show neither reliance nor possible prejudice as a result of a defective SPD in order to recover, a reading of the decision in *Edwards v. State Farm Mut. Auto. Ins. Co.*, 851 F.2d 134 (6th Cir. 1988) clearly indicates that the Sixth Circuit flatly rejected a "detrimental reliance" standard and adopted a reliance or possible prejudice standard. The Court stated: " . . . the explicit language of the Summary could or would have caused Edwards and similarly situated unsophisticated lay employees to rely upon State Farm's inadvertent misrepresentation to their detriment." 851 F.2d at 136.

The primary holding of the Second Circuit in *Burke* concerns the burden of proof and the burden of going

forward with the evidence. The Court adopted a "likely prejudice" standard and held that a presumption of prejudice arises in favor of the plan participant or beneficiary when he has met his initial burden of showing that he was likely to have been harmed by the deficient SPD. At that point, the burden of going forward shifts to the plan administrator, who may rebut this presumption of likely prejudice by proof that the deficiency of the SPD was harmless error. By way of example, the Court stated that the presumption may be rebutted by proof that the participant was aware of the actual plan terms, notwithstanding the deficiency of the SPD.

Petitioner focuses on the language chosen by the Second Circuit in adopting the standard that is to be applied, as opposed to the quantum of proof required to meet that standard. Decisions in other Circuits which are relied upon by Petitioner to establish the conflict among the Circuits do not deal with the burden of proof issue which is the primary holding of the Court.

II. Whether Omissions In SPD's Should Be Treated The Same As Affirmative Misstatements Is An Issue Not Properly Raised In This Case.

Petitioner attempts to raise, for the first time in connection with its application to this Court, the issue of whether omissions in SPDs are to be treated the same as affirmative misstatements. This is an issue that was not raised at the Circuit Court level and the Second Circuit's decision does not address the issue. Therefore, it was not properly raised for argument in this Court.

In any event, the cases cited by Petitioner in support of its position are all cases arising under welfare plans

rather than pension plans. Congress has chosen to establish two separate categories of plans covered by ERISA. ERISA distinguishes between pension plans and welfare plans. A pension plan is one that provides retirement income to employees or provides for the deferral of income by employees. 29 U.S.C. § 1002(2). Welfare plans, on the other hand, include plans established for the purpose of providing health insurance, disability insurance and the like. 29 U.S.C. § 1002(1). Welfare plans are not subject to the same requirements under ERISA as are imposed upon pension plans. Compare 29 U.S.C. § 1051 *et seq.* with 29 U.S.C. § 1081 *et seq.* The disclosure requirements specified by ERISA and regulations promulgated thereunder are different in connection with pension plans as opposed to welfare plans.

For the reasons set forth above, the issue Petitioner attempts to raise concerning a split among the Circuits concerning the treatment of deficiencies in welfare plan SPDs depending upon whether the deficiency is an omission or a misstatement is not an issue that was raised in this case and, therefore, not appropriate for review by this Court.

CONCLUSION

It is respectfully requested that the Writ of Certiorari sought by Petitioner in this case be denied.

Respectfully submitted,

GEORGE A. SCHELL, ESQ.
Counsel of Record for Respondent
SCHELL & SCHELL, P.C.
410 Perinton Hills Office Park
Fairport, NY 14450
(585) 377-2682

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No. 03-565

IN THE

Supreme Court of the United States

KODAK RETIREMENT INCOME PLAN AND
KODAK RETIREMENT INCOME PLAN COMMITTEE,

Petitioners,

v.

SALLY J. BURKE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONERS

Eric J. Ward
WARD, NORRIS,
HELLER & REIDY LLP
300 State Street
Rochester, NY 14614
(585) 454-0700

Robert A. Long
Counsel of Record
John M. Vine
Kevin C. Newsom
COVINGTON & BURLING
1201 Pennsylvania Avenue, NW
Washington, DC 20004-2401
(202) 662-6000

Counsel for Petitioners

November 2003

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REPLY BRIEF FOR PETITIONERS

Respondent does not dispute that the question presented in this case is both important and recurring. *See* Pet. 20; *see also* Br. of The ERISA Industry Committee as Amicus Curiae 2 ("The petition in this case presents a question of unusual importance to employers throughout the nation who sponsor employee benefit plans . . . ."). Nor does Respondent seek to defend the court of appeals' decision on the merits, or to argue that the facts or procedural posture of this case make it anything less than an excellent vehicle for resolving the question presented. Instead, Respondent offers only two arguments in her brief in opposition: first, that there is no circuit split on the question presented; and second, that any argument about the appropriate treatment of omissions in Summary Plan Descriptions – as distinguished from affirmative misstatements – is not properly presented. Respondent is wrong on both counts.

I. This Case Squarely Implicates An Acknowledged Circuit Split

Respondent first contends that, in fact, the courts of appeals are not divided with respect to the question presented in this case. Br. in Opp. 3-7. Respondent is simply wrong. The Second Circuit – both in this case and in prior decisions – has frankly acknowledged the split, as have other courts and treatise-writers. *See, e.g.*, Pet. App. 13a ("The circuits are divided over whether detrimental reliance or prejudice is required to recover in deficient SPD cases."); *Layaou v. Xerox Corp.*, 238 F.3d 205, 212 (2d Cir. 2001) ("The circuit courts are divided as to whether proof of actual detrimental reliance upon a faulty SPD is a prerequisite to recovery."); *Burstein v. Retirement Account Plan for Employees of Allegheny Health Educ. & Research Found.*, 334 F.3d 365, 380 (3d Cir. 2003) ("[O]ther Courts of Appeals that have spoken to this issue have taken differing positions."); ABA Section of Labor and Employment Law, *Employee Benefits*

Law 1000 (2d ed. 2000) ("The courts have split on the extent to which reliance and/or prejudice must be proven where there is a discrepancy between the SPD and the plan document.").

Respondent leads off her argument with the assertion – bolstered by an impressive-looking string-cite – that "[v]irtually all of the Circuit Courts have held that when there is a conflict between an SPD and a Pension Plan, the SPD controls." Br. in Opp. 3. But that statement merely begs the question presented here: *Under what circumstances* does an SPD trump the plain terms of an ERISA plan? As explained in the Petition, different courts of appeals have answered *that* pivotal question in very different ways. Two circuits (the Seventh and Eleventh) have said that an SPD controls only where the plaintiff can prove detrimental reliance. *See* Pet. 9-12. Two others (the Third and Sixth) have imposed a form of strict liability on employers, under which an SPD controls even without *any* showing of reliance or prejudice. *See id.* at 12-14. And five circuits (the First, Second, Fourth, Eighth, and Tenth) have applied some variant of an amorphous standard under which an SPD controls upon a showing of possible or likely prejudice or reliance. *See id.* at 14-16. Indeed, Respondent ultimately acknowledges that "[i]n addition to requiring proof of the defect in the SPD" the courts of appeals "require some additional proof of the effect of that defect prior to recovery by a plan participant or a beneficiary," and that "[t]he language chosen by the various courts is describing that additional quantum of proof has varied." Br. in Opp. 3-4.[1]

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[1] There is nothing to Respondent's suggestion that the Second Circuit decided only a "burden of proof" question that is somehow separate and distinct from the "standard" question that has divided the circuits. The Second Circuit expressly addressed the question "[w]hether ERISA requires the beneficiary to demonstrate reliance upon a deficient SPD," (...continued)

In the end, Respondent takes issue with the Petition's explanation of the prevailing law in only two courts – the Seventh Circuit, which the Petition described as a "detrimental reliance" jurisdiction (Pet. 9-10), and the Sixth Circuit, which the Petition put in the "neither reliance nor prejudice" camp (*id.* at 12-13). Respondent rightly does *not* dispute the Petition's characterization of the Eleventh Circuit as requiring a showing of detrimental reliance (*see id.* at 10); the First, Second, Fourth, Eighth, and Tenth Circuits as requiring a showing of possible or likely prejudice or reliance (*see id.* at 14-16); and the Third Circuit as requiring a showing of neither (*see id.* at 12-14). Thus, a three-way split remains even if one accepts Respondent's arguments concerning the state of the law in the Sixth and Seventh Circuits.

But those arguments are wrong in any event. As for the Seventh Circuit, Respondent asserts that "the statements relied upon by Petitioner were in the form of dicta in the course of an opinion." Br. in Opp. 4. With respect to *Health Cost Controls of Illinois, Inc. v. Washington*, 187 F.3d 703 (7th Cir. 1999), for instance, Respondent says that "the opinion clearly states that the Court was not ruling upon the issue of reliance in connection with conflicts between [SPDs] and the plan wording itself." Br. in Opp. 4. For support, Respondent points to language in the opinion in which the court says that "[w]e need not get into the issue of reliance here . . . ." *Id.* (quoting *Health Cost Controls*, 187 F.3d at 711). The context makes perfectly clear, however, that what the Seventh Circuit meant was that it did not need to "get

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and expressly decided that question by "adopt[ing] a prejudice standard." Pet. App. 13a. The Second Circuit's brief discussion of the burden of proof for a showing of prejudice, *see id.* at 16a, simply fills in the details of that court's particular variation on the admittedly "amorphous" prejudice standard, *id.* at 15a.

into the issue of" whether the plaintiff in that case had proven detrimental reliance, *not* the antecedent question – which the Seventh Circuit had already answered in the affirmative – whether proof of detrimental reliance is required in the first place. Indeed, in the paragraph immediately preceding the language Respondent quotes, the *Health Cost Controls* court reiterated the governing rule in the Seventh Circuit that when "the plan and the [SPD] conflict, the former governs . . . unless the plan participant or beneficiary *has reasonably relied on the [SPD] to his detriment*." 187 F.3d at 711 (emphasis added) (citations omitted).

In short, the Seventh Circuit has settled – firmly – on a detrimental-reliance standard. Indeed, ultimately, Respondent does not contend otherwise. She does not, for instance, maintain that the Seventh Circuit's repeated affirmations of the detrimental-reliance standard somehow leave room for doubt as to the appropriate rule, or suggest that the circuit is flirting with a different standard. Nor could she – the case law is clear. *See, e.g.*, *Helfrich v. Carle Clinic Ass'n, P.C.*, 328 F.3d 915, 918 (7th Cir. 2003) (referring to "the rule" that "summary plan descriptions, if relied on, trump the plan"); *Andersen v. Chrysler Corp.*, 99 F.3d 846, 859 (7th Cir. 1996) ("erroneous information in a summary plan description" does not give rise to a valid claim "without a showing of bad faith, active concealment or detrimental reliance").

As for the Sixth Circuit, Respondent claims that a close reading of *Edwards v. State Farm Mutual Automobile Insurance Co.*, 851 F.2d 134 (6th Cir. 1988), "clearly indicates" that the court there "adopted a reliance or possible prejudice standard." Br. in Opp. 6. Again, it bears emphasis that even if Respondent were right about the Sixth Circuit, the three-way circuit split would remain, as there is no dispute that the Third Circuit now permits recovery without any showing of either reliance or prejudice. *See* Pet. 13-14 (describing *Burstein v. Retirement Account Plan for*

Employees of Allegheny Health Educ. and Research Found., 334 F.3d 365 (3d Cir. 2003)); Br. in Opp. 6 (same). But Respondent is wrong about the Sixth Circuit, in any event. The *Edwards* court stated, in no uncertain terms, that "[a]lthough in the instant case, the appellee relied to his detriment upon the language" of the SPD, "existing precedent does not dictate that a claimant who has been misled by summary descriptions must prove detrimental reliance." 851 F.2d at 137. To make the point even clearer, the court then emphasized that it would not "undermine" what it viewed as Congress's "legislative command" prohibiting misleading SPDs by imposing any "technical requirements" on ERISA plaintiffs. *Id.* Based on this language in the *Edwards* opinion, the Second Circuit in this case correctly observed that the Sixth Circuit "require[s] neither reliance nor prejudice." Pet. App. 13a-14a.

Thus, Respondent is simply mistaken in asserting that there is no circuit split concerning the question presented here. Respondent's nitpicking cannot change the fact that the Seventh Circuit has clearly settled on a detrimental-reliance rule, or the fact that the Sixth Circuit requires neither reliance nor prejudice as a prerequisite to recovery. And, in any event, as explained above, even if Respondent were right about the Sixth and Seventh Circuits, a three-way circuit conflict would remain. For all of the reasons specified in the Petition, this Court should grant certiorari, resolve the persistent split, and bring coherence to this area of ERISA doctrine.[2]

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[2] Respondent rightly does not seek to place any weight on the Second Circuit's conclusory statement that "[w]e disagree that the record precludes a finding of detrimental reliance." Pet. App. 13a. The Second Circuit offered no explanation or support for this throw-away statement, which in any event stops well short of an actual finding of detrimental reliance, or even a declaration that the Second Circuit would have made such a finding if it had been in the district court's place. For its part, the (...continued)

II. Respondent Is Wrong To Suggest That The "Issue" Whether Omissions And Misstatements Should Be Treated Similarly Is Not Properly Presented

In three short paragraphs, Respondent charges Petitioners with "attempt[ing] to raise, for the first time in connection with its application to this Court, the issue of whether omissions in SPDs are to be treated the same as affirmative misstatements." Br. in Opp. 7. Of course, this argument does not answer the Petition's main thrust – that there is an acknowledged and persistent circuit split concerning whether an ERISA plaintiff seeking to recover based on a discrepancy between an SPD and a formal plan document must show (i) detrimental reliance, (ii) possible or likely prejudice, or (iii) neither reliance nor prejudice. *See supra* Part I. In any event, Respondent's effort to show waiver (or something like it) is misguided, for several reasons.

First, Respondent is wrong to describe the appropriate treatment of omissions in SPDs as a stand-alone "issue" in this case. Petitioners' principal purpose in highlighting the circuits' divergent approaches to SPD silence (*see* Pet. 16-19) was to show the extent of the

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district court expressly found that *there was no evidence* in the record that Respondent had relied to her detriment on the SPD. *Id.* at 28a. To the contrary, the district court found: "In fact, [Respondent] testified that she never reviewed the SPD, and that her husband's decision not to list her as a domestic partner was an affirmative decision so as not to jeopardize health insurance coverage." *Id.* at 27a. The district court's factual findings lead directly to the conclusion that Respondent did not show detrimental reliance. Indeed, the findings indicate that Respondent and her husband would have acted no differently if the SPD had included a seventeenth repetition of the affidavit requirement in the section summarizing SIB. The Second Circuit did not suggest any basis for rejecting these factual findings as clearly erroneous.

confusion in the courts of appeals over the proper approach to alleged discrepancies between SPDs and plan documents. Some courts demand proof of detrimental reliance, others require a lesser showing of reliance or "possible prejudice," and still others require nothing at all. Likewise, some courts permit an SPD's silence to trump plan language, while a number of others do not. The circuits are, as the Petition says, in "complete disarray" (*see id.* at 9), and their divergent approaches to SPD silence are indicative of that disarray.[3]

Second, Respondent is wrong to suggest Petitioners are barred from arguing in this Court that omissions in SPDs should be treated differently from affirmative misstatements. Respondent does not dispute that the Question Presented in the Petition fairly includes the question how omissions in SPDs should be treated. *See* Sup. Ct. R. 14.1(a). Further, this Court's precedents make clear that parties waive *issues*, not *arguments*: "'Once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below.'" *Harris Trust and Sav. Bank v. Salomon Smith Barney, Inc.*, 530 U.S. 238, 245 (2000) (quoting *Yee v. City of Escondido*, 503 U.S. 519, 534-35 (1992)). Any argument that an SPD's silence cannot trump plan language is just that – an *argument* in support of Petitioners' basic contention that Respondent's claim here is not cognizable under ERISA Section 502(a)(1)(B).[4]

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[3] Although Respondent attempts to distinguish the "omission" cases on the ground that they involved welfare plans rather than pension plans (Br. in Opp. 7-8), the courts' opinions do not suggest that any such distinction should matter with respect to the appropriate treatment of SPD silence.

[4] Petitioners did not overlook the "omission" point in the Second Circuit. Their briefs in that court referred to Respondent's allegation that the SPD "does not specifically state the need for an affidavit of domestic partnership." Pet. C.A. Br. 7; *see also id.* at 34 ("alleged failure of the SPD to clearly state than an Affidavit of Domestic Partnership must be (...continued)

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Eric J. Ward
WARD, NORRIS,
HELLER & REIDY LLP
300 State Street
Rochester, NY 14614
(585) 454-0700

Robert A. Long
Counsel of Record
John M. Vine
Kevin C. Newsom
COVINGTON & BURLING
1201 Pennsylvania Avenue, NW
Washington, DC 20004-2401
(202) 662-6000

Counsel for Petitioners

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signed and filed in order to be eligible for domestic partner for SIB"). The Second Circuit's opinion, too, clearly recognizes that the alleged deficiency in the SPD involves an omission rather than a misstatement. *See* Pet. App. 11a ("Because the relevant section of the SPD *omits* the affidavit requirement, it conflicts with the Plan." (emphasis added)). In the court below, Petitioners had good reason not to press an argument that an SPD's silence cannot trump plan language: the Second Circuit effectively foreclosed that argument in *Layaou v. Xerox Corp.*, 238 F.3d 205, 211 (2d Cir. 2001) (indicating that an SPD's failure to "satisfy ERISA's disclosure obligations" – *i.e.*, its silence – is sufficient to permit recovery).

(3)

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IN THE

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KODAK RETIREMENT INCOME PLAN COMMITTEE,
Petitioners,

v.

SALLY J. BURKE,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF THE ERISA INDUSTRY COMMITTEE AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

ROBERT N. ECCLES
(*Counsel of Record*)
JONATHAN D. HACKER
MARTHA DYE
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300

Attorneys for Amicus Curiae

14 00

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BRIEF OF THE ERISA INDUSTRY COMMITTEE AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

The ERISA Industry Committee ("ERIC") respectfully submits this brief *amicus curiae* in support of the petition for a writ of certiorari in this case. Letters from petitioners and respondent indicating consent to file have been filed with the Clerk.[1]

INTEREST OF AMICUS CURIAE

ERIC is a nonprofit organization representing America's largest private employers. These are companies that maintain ERISA-covered pension, healthcare, disability, and other employee benefit plans, providing benefits to millions of active workers, retired persons, and their families nationwide. All of ERIC's members do business in more than one State, and many have employees in all fifty States. ERIC frequently participates as an amicus in cases with the potential for far-reaching effects on employee benefit plan design or administration.[2]

ERIC and its member companies have a vital interest in this case, which deepens an existing circuit split and allows participants of ERISA plans to recover benefits based on the terms of a Summary Plan Description ("SPD"), rather than the terms of the applicable Plan Document, without demonstrating that they detrimentally relied on the SPD. If allowed to stand, the decision below will upset the delicate balance

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[1] Pursuant to Rule 37.6, amicus states that no counsel for a party authored this brief in whole or in part. No person or entity, other than ERIC and its members, made a monetary contribution to the preparation and submission of this brief.

[2] *See, e.g.*, *Black & Decker Disability Plan v. Nord*, 123 S. Ct. 1965 (2003); *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432 (1999); *Lockheed Corp. v. Spink*, 517 U.S. 882 (1996); *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989); *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58 (1987).

that Congress struck, in enacting ERISA, between encouraging employers to sponsor employee benefit plans and protecting employees via appropriate disclosures. The Second Circuit's ruling has the effect of creating unpredictable liabilities for ERISA plans and, if allowed to stand, will cause additional expense in the administration of plans and undermine their financial viability, to the detriment of both the employers and the employees whose contributions fund the plans.

Because of the importance of these issues to ERIC and its members, ERIC respectfully submits this brief urging the Court to grant the petition for certiorari, reverse the decision below, and require that participants seeking benefits based on an error or omission in an SPD first establish that they detrimentally relied on the SPD.

REASONS FOR GRANTING THE WRIT

The petition in this case presents a question of unusual importance to employers throughout the nation who sponsor employee benefit plans: whether an employee who seeks benefits based *not* on the terms of the plan itself, but on the basis of a statement or omission in a document summarizing and describing the plan (the "Summary Plan Description" or SPD), must show that he or she detrimentally relied on the SPD's statement or omission in order to obtain the additional, extra-plan benefit. As explained below, *infra* at 6-11, although this question is nominally framed as a simple question of the evidentiary proof required to recover benefits under ERISA § 502(a)(1)(B), identifying the correct answer to that question implicates issues of the most fundamental order concerning the nature and scope of the protection ERISA confers on the benefits provided under the terms of employee welfare and health plans.

Certiorari should be granted to answer that question for two reasons. First, whatever the ultimate answer may be, a conclusive resolution by this Court would be an improve-

ment over the current state of the law, which is in utter disarray. As matters stand now – and as they will continue to stand unless and until this Court intervenes – almost all of the circuits have addressed the issue. The rule in some is that the SPD can create benefit rights that trump the plan as a matter of law; in others it is that the SPD can trump the plan only if the SPD is deemed "prejudicial"; still others hold that the SPD will trump the plan only if the employee actually and reasonably relied to her detriment on the description of benefits contained in the SPD. This is not a recipe for the effective and efficient administration of employee benefit plans, especially those with nationwide reach. It is instead a guaranteed prescription for inequity, as well as increased costs and, therefore, increased pressure to reduce overall benefits.

Second, certiorari should be granted because the decision below is wrong and must be reversed, if this Court is to hold ERISA true to its promise of protecting the contractual benefit rights afforded *under the terms of benefit plans* while still preserving the right of employers and other plan sponsors to decide for themselves what benefits those plans should provide. It is one thing to say that, even though ERISA protects only those rights afforded under the plan itself, a court may enforce additional rights stated in or implied from an SPD, where the employee actually and reasonably relied on the SPD's description of plan benefits. It is another thing entirely to say that the SPD can create extra-plan rights *even where the plaintiff has not acted in reliance on the SPD.* Courts allow rights to be derived from the SPD because they think it unfair to deny recovery to an employee or beneficiary who was misled by a deficient SPD. But if the employee did not rely on the SPD then she necessarily was not misled by it, and there is thus no warrant for granting the employee benefits unavailable under the terms of the plan itself.

This Court should grant certiorari to resolve the deep and intolerable split in the circuits and to make clear that detri-

mental reliance is a prerequisite to any recovery of extra-plan benefits based on statements and omissions in an SPD.

A. Certiorari Should Be Granted To Resolve The Circuit Split And Establish Nationwide Uniformity On An Issue Directly Affecting Employee Benefit Plan Administration

The petition amply demonstrates the division among the circuits on the question presented in this case. The circuit conflict is acknowledged in the decision below, in other decisions and in the treatises, and need not be restated here. It suffices to say that nine of the circuits have addressed this issue, and that among them they have adopted four different rules of law applicable to actions seeking benefits on the basis of statements or omissions. *See* Pet. 8-19.

A circuit split that wide and deep would be more than sufficient reason to grant certiorari in a case of any kind. Amicus ERIC and its members submit, however, that the need for review is even more pressing here, because the issue that has so sharply divided the circuits is an issue that directly and materially affects the administration of nationwide employee benefit plans.

This Court has acknowledged the unique importance of ensuring uniformity and certainty under ERISA, given "the comprehensive nature of the statute, the centrality of pension and welfare plans in the national economy, and their importance to the financial security of the Nation's work force." *Boggs v. Boggs*, 520 U.S. 833, 839 (1997). ERISA was enacted specifically to supplant the common-law system of varying state-by-state regulation of employee benefit plans with a single federal regulatory scheme, to provide both the sponsors and the beneficiaries of such plans a measure of stability and security in the enforcement of the laws governing benefit plans. As this Court has explained:

> An employer that makes a commitment systematically to pay certain benefits undertakes a host of obliga-

> tions, such as determining the eligibility of claimants, calculating benefit levels, making disbursements, monitoring the availability of funds for benefit payments, and keeping appropriate records in order to comply with applicable reporting requirements. The most efficient way to meet these responsibilities is to establish a uniform administrative scheme, which provides a set of standard procedures to guide processing of claims and disbursement of benefits. Such a system is difficult to achieve, however, if a benefit plan is subject to differing regulatory requirements in differing States.

Fort Halifax Packing Co. v. Coyne, 482 U.S. 1, 9 (1987). ERISA thus reflects a "congressional mandate for the[] uniform and comprehensive regulation" of employee benefit plans. *Boggs*, 520 U.S. at 836. Ensuring a system of "nationally uniform plan administration" is a "core . . . concern" of the statute. *Egelhoff v. Egelhoff*, 532 U.S. 141, 147-48 (2001).

The current disuniformity and inconsistency among the circuits on the question of what a plaintiff must prove to recover benefits on the basis of statements or omissions in an SPD directly flouts the congressional mandate and core concerns underlying ERISA. Allowing that controversy to persist would have numerous adverse effects on plans and their beneficiaries. For instance, large benefit plans currently face the risk that some plan beneficiaries will be entitled to recover benefits unavailable to others in the same plan based simply on where the beneficiary is located or elects to sue. There is nothing sensible or fair about that result. Further, to avoid the inconsistent adjudication of challenges based on SPDs, plan administrators may be tempted to "load up" the SPD with extensive nuance to avoid all such challenges, even though the entire point of the SPD is to speak in plain and understandable terms without all the technical detail that is inherent in formal plan documents. *See* 29 C.F.R.

§ 2520.102-2(a); *Herrman v. Cencom Cable Assocs., Inc.*, 978 F.2d 978, 984 (7th Cir. 1992) ("Larding up the summary with minutiae would defeat that document's function: to provide a capsule guide in simple language for employees."); *Lorenzen v. Employees Ret. Plan of the Sperry & Hutchinson Co.*, 896 F.2d 228, 236 (7th Cir. 1990) (law should not be construed to result in SPDs that are "choked with detail and hopelessly confusing"). There is nothing sensible or fair about that result either. And, of course, inconsistency in the laws governing plans with nationwide scope creates unpredictable plan liabilities, which necessarily increases the costs of providing benefits, which in turn leads inevitably to decreased benefits. *See Fort Halifax*, 482 U.S. at 11 ("A patchwork scheme of regulation would introduce considerable inefficiencies in benefit program operation, which might lead those employers with existing plans to reduce benefits, and those without such plans to refrain from adopting them."). There most certainly is nothing fair or sensible about that result.

While this Court's certiorari jurisdiction exists in part to ensure nationwide uniformity of federal law on any issue, Congress has made clear that such nationwide uniformity is especially important in cases involving the administration of employee benefit plans. This is such a case. Certiorari should be granted to resolve the costly and unproductive conflict among the circuits over the question whether a plaintiff seeking to recover extra-plan benefits based on representations in an SPD must prove reliance on the SPD.

B. Proof Of Detrimental Reliance Should Be Required In All Actions Seeking To Recover Extra-Plan Benefits On The Basis Of Statements Or Omissions In SPDs

The petition for certiorari accurately and effectively summarizes the principal doctrinal reasons that any plaintiff seeking to obtain benefits on the basis of statements or omissions in the SPD should be required to demonstrate that he or

she relied to his or her detriment on those statements or omissions. ERIC endorses that analysis and will not repeat it here. Instead we briefly set forth the broader legal context in which this issue is situated – a context which confirms the conclusion that reliance on the SPD must be required in cases of this nature.

Analysis of the question whether a plaintiff seeking to obtain benefits based on an SPD must have relied on that SPD must begin with the recognition that the plaintiff's right to such benefits is *not* protected by ERISA itself. As elaborated below, ERISA protects only benefits provided under *the terms of the plan*. *See* 29 U.S.C. § 1132(a)(1)(B). Whatever protections may exist for "rights" created by an SPD are entirely the product of judicial decisions, which have imposed such protections for equitable reasons.

This case illustrates the distinction between true "plan benefits" and "SPD benefits" of the type at issue here. It is undisputed that respondent in this case is *not* eligible for survivor income benefits under the terms of the Kodak Income Retirement Plan ("the Kodak Plan"). Specifically, respondent failed to submit a joint affidavit required by the Kodak Plan to establish "domestic partner" status and thus entitlement to survivor benefits as a domestic partner. The Second Circuit nevertheless held that respondent is entitled to survivor income benefits, on the ground that the SPD distributed to Kodak employees omitted the joint affidavit requirement. When an SPD "conflicts" with the terms of a plan, the Second Circuit held, "the SPD controls" the benefits available under a plan, Pet. App. 10a, at least insofar as it is "likely" that a plan participant or beneficiary was "harmed" by a misstatement or omission in the SPD, *id.* at 16a.

Thus, in allowing respondent to recover benefits on the basis of an omission in the SPD without requiring reliance, the Second Circuit presupposed that there are *any* circumstances in which an SPD can create enforceable rights to extra-plan benefits. Even if that premise is correct, it is impor-

tant at least to recognize that the "right" to recover extra-plan benefits is a judge-made right that is not conferred by ERISA itself.

ERISA does not create substantive rights to benefits of any kind. "Nothing in ERISA requires employers to establish employee benefits plans. Nor does ERISA mandate what kind of benefits employers must provide if they choose to have such a plan." *Lockheed Corp. v. Spink*, 517 U.S. 882, 887 (1996); *see Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 732 (1985) (ERISA "does not regulate the substantive content of welfare-benefit plans"). The rights protected by ERISA are, rather, exclusively contractual in nature. That is, an employer may or may not choose to create an employee benefit plan, but if it does create one, ERISA treats the rights conferred under the plan as contractual and establishes a federal scheme for regulating and enforcing those contractual rights. *See Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 147 (1985) (describing plan as "contract" and plan benefits as "contractually authorized"). In accordance with that scheme, an action to recover benefits under § 502(a)(1)(B) is regarded as "a suit to recover benefits due *under the plan*, to enforce rights under *the terms of the plan*, and to obtain a declaratory judgment of future entitlement to benefits *under the provisions of the plan contract*." *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 108 (1989) (emphasis added).

Inasmuch as ERISA itself only protects benefits provided under the terms of the "plan contract," it follows that any "right" to benefits beyond those provided by the terms of the plan contract must have its source elsewhere. In the case of rights resulting from misstatements or omissions in an SPD, that source has been equity. It is simply "unfair," many courts have held, for an employer to distribute an SPD to employees for the purpose of explaining plan benefits, and then to favor an inconsistent plan provision over the SPD's

description of the plan *when the employee has relied on the SPD*. As the leading case for this principle put it:

> It is of no effect to publish and distribute a plan summary booklet designed to simplify and explain a voluminous and complicated document, and then proclaim that any inconsistencies will be governed by the plan. Unfairness will flow to the employee *for reasonably relying on the summary booklet.*

McKnight v. Southern Life & Health Ins. Co., 758 F.2d 1566, 1570 (11th Cir. 1985) (emphasis added); *see Heidgerd v. Olin Corp.*, 906 F.2d 903, 908 (2d Cir. 1990) (quoting *McKnight*); *Hansen v. Continental Ins. Co.*, 940 F.2d 971, 982 (5th Cir. 1991) (same); *Edwards v. State Farm Mut. Auto. Ins. Co.*, 851 F.2d 134, 136 (6th Cir. 1988) (same).

It is thus evident that a requirement of reasonable reliance is presumed by, and inherent in, the very reason that plan participants have been allowed to recover extra-plan "SPD benefits" in the first place. The point can be put two ways. First, one can say that absent reasonable reliance, the basic unfairness that justifies recovery for an SPD misstatement or omission is simply lacking. That is, while it may be unfair to deny recovery to an employee who was misled by an SPD, if the employee did not see or otherwise rely on the SPD, it is impossible to say that he or she was misled by it. It is thus not unfair, in any way, to deny recovery of benefits on the basis of an SPD error on which the employee did not rely.

Second, as a more formal matter, one can say that absent reasonable reliance, the employee cannot satisfy the legal requirements for recovery of a right established not by the plan contract, but by equity. The judge-made "right" to an extra-plan "SPD benefit" is tantamount to an application of the equitable principle of promissory estoppel: even though a "promise" contained in or inferred from an SPD is not enforceable as part of the plan contract, courts will enforce the

promise if the employee relied to his or her detriment on it. *See generally* Stanley D. Henderson, *Promissory Estoppel and Traditional Contract Doctrine*, 78 Yale L.J. 343, 344 (1969) ("the basic elements of promissory estoppel doctrine have been fashioned in the context of the explicit assumption that the doctrine properly operates outside the bargain relationship"). Proof of detrimental reliance is, of course, inherent in any claim of promissory estoppel. *See Restatement (Second) of Contracts* § 90 (1981). It follows that a court has no legal basis for enforcing a "promise" suggested in an SPD in the absence of reasonable reliance.

However the point is made, what matters is that any right to obtain extra-plan benefits pursuant to an SPD misstatement or omission *necessarily* presupposes reasonable reliance by the employee asserting such a right. Without such reliance, there is no legal principle that would allow an employee to recover benefits beyond what the employer chose to provide in the terms of the plan. To the contrary, this Court has repeatedly made clear that under ERISA, employers remain free to decide for themselves what substantive benefits to provide. *See supra* at 8.

It is no answer to say, as the Second Circuit did in this case, that requiring reliance would be inconsistent with "ERISA's objective to protect the employee against inadequate SPDs," Pet. App. 14a, and that "[t]he consequences of an inaccurate SPD must be placed on the employer" rather than the employee, who is "less equipped to absorb the financial hardship of the employer's errors," *id.* at 15a. These formulations do nothing more than reiterate the fairness point already discussed, and thus do not respond to the observation that a rule based on fairness presupposes a reliance requirement. In other words, there is no need to "protect the employee against [an] inadequate SPD[]" if the employee never relied on the SPD; there are no "consequences" of an inaccurate SPD when nobody has relied on the SPD; and

there will be no "financial hardship" resulting from errors in an SPD when there is no reliance on the errors.

In short, as matter of both logic and law, it is impossible to avoid requiring a plaintiff who seeks to obtain benefits not on the basis of the plan contract, but on the basis of a statement or omission in the SPD, from demonstrating that he or she acted in reasonable reliance on the SPD's representations.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

ROBERT N. ECCLES
(*Counsel of Record*)
JONATHAN D. HACKER
MARTHA DYE
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300

Attorneys for Amicus Curiae

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